Supreme Court, U.S.

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No.

In the

Supreme Court of the United States

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the ICC Termination Act preempt state regulation of intrastate spur, industrial, team, switching, or side tracks and grant exclusive jurisdiction over such tracks to the Surface Transportation Board, even in the case of tracks which serve and/or are owned by only one shipper.

2. Whether a Certificate of Public Convenience and Necessity was required pursuant to 49 U.S.C., § 10901(a) before the railroad track constructed across petitioner's property, which is approximately ten (10) miles in length, cost approximately $26,000,000.00 to build and was constructed solely for and is used solely by a common carrier to transport full, complete, loaded, unit trains in a continuous through journey in interstate commerce, could lawfully be constructed or a common carrier may lawfully conduct such interstate operations over it.

PARTIES TO THE PROCEEDINGS

Petitioner

B. Willis, C.P.A., Inc., is a professional corporation wholly owned by Buck Willis, C.P.A. It has no subsidiaries.

Respondents

Surface Transportation Board and the United States of America

Interveners Below

Burlington Northern and Santa Fe Railway Company and Public Service Company of Oklahoma

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ... 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 6

CONCLUSION 29

APPENDIX

CIRCUIT COURT OPINION 1a

STB DECISION 4a

ORDER DENYING REHEARING 13a

TABLE OF AUTHORITIES

Cases

Page

CASES
ALABAMA POWER CO. V. GORSUCH,
672 F.2D 1 (D.C. CIR. 1982) 17

BALTIMORE & ANNAPOLIS R. V. WASH. METRO AREA TRAN.,
642 F2D 1365 (D.C. CIR. 1980) 22

BD. OF REGENTS OF UNIVERSITY OF WASH. V. E.P.A.,
86 F.3D 1214 (D.C. CIR. 1996) 17

BNSF CORP. V. ANDERSON,
959 F. SUPP. 1288 (DIST. MONT. 1997) 8

BOGGS V. RUBIN, 161 F.3D 37 (D.C. CIR. 1998) 17

BROTHERHOOD OF LOCOMOTIVE ENGINEERS V. U.S.,
101 F.3D 718 (D.C. CIR. 1996) 27, 28

CARDUCCI V. REGAN, 714 F.2D 171 (D.C. CIR. 1983) 17

CHARTER OIL CO. V. AMERICAN EMPLOYERS, INS. CO.,
69 F.3D 1160 (D.C. CIR. 1995) 17

CHEVRON, U.S.A., INC. V. NATURAL RESOURCES DEFENSE,
104 S. CT. 2778, 467 U.S. 837 (1984) 19

COMSAT CORP. V. F.C.C.,
250 F.3D 931 (5TH CIR. 2001) 16

CONNECTICUT NATIONAL BANK V. GERMAIN
503 U.S. 249 20

CONSUMER UNION OF UNITED STATES, INC. v. FEDERAL POWER COMMISSION, 510 F.2D 656 (D.C. CIR. 1974) 16

CORSON AND GRUMAN COMPANY v. N.L.R.B., 899 F.2D 47 (D.C. CIR. 1990) 17

CSX TRANSPORTATION INC. v. GEORGIA PUBLIC SERVICE COMMISSION, 944 F. SUPP. 1573 (N.D. GA. 1996) ..... PASSIM

DURHAM v. XEROX CORP., 18 F.3D 836 (10TH CIR. 1994) 17

GREATER BOSTON TELEVISION CORPORATION v. F.C.C., 444 F.2D 841, 851 (D.C. CIR. 1970) 23

HANSON NATURAL RESOURCES CO., 1994 WL 673712 (NOV. 15, 1994) 11, 15

HUGHES v. CONSOL-PENNSYLVANIA COAL CO., 945 F.2D 594 (3D CIR. 1991) 27

I.C.C. v. MEMPHIS UNION STATION COMPANY, 360 F.2D 44, 50 (6TH CIR. 1966) 27

ILLINOIS COMMERCE COMMISSION v. I.C.C., 879 F.2D 917 (D.C. CIR. 1989) 10, 13

KASTIGAR v. UNITED STATES, 406 U.S. 441, 93 S.CT. 1653 (1972) 14

MULLANE v. CENTRAL HANOVER TRUST CO., 339 U.S. 306 (1950) 18

NEW ORLEANS TERMINAL COMPANY v. SPENCER,
366 F.2D 160 (5TH CIR. 1966) 27

NEW YORK CENT. RY. CO. v. SOUTHERN RY.,
226 F.SUPP. 463 (N.D. ILL. 1964), AFF'D
338 F.2D 667 (7TH CIR. 1964), CERT. DENIED,
380 U.S. 954 (1965), REH'G DENIED,
381 U.S. 907 (1965) 10, 11

NICHOLSON v. I.C.C.,
711 F2D 364 (D.C. CIR. 1983) 25, 27

OFFICE OF COM. OF UNITED CHURCH OF CHRIST v. F.C.C.,
707 F.2D 1413 (D.C. CIR. 1983) 23

OKLAHOMA NATURAL GAS CO. v. FERC,
28 F.3D 1281 (D.C. CIR. 1994) 19

PIAZZA v. APONTE ROQUE,
909 F.2D 35 (1ST CIR. 1990) 16

PUBLIC SERVICE COMPANY v. B. WILLIS, C.P.A., INC.,
941 P.2D 995 (OKLA. 1997) 5

RAILWAY LABOR EXEC. ASS'N v. CITY OF GALVESTON, TEXAS,
849 F.2D 145(5TH CIR. 1988) 27

STUDENTS AGAINST GENOCIDE v. DEPARTMENT OF STATE.
257 F.3D 828 (D.C. CIR. 2001) 17

TEXAS & N.O.R. CO. v. NORTHSIDE BELT RY. CO.,
276 U.S. 475, 48 S. CT. 361 (1928) 29

TEXAS & P. RY. v. GULF, COLO. & S.F. RY.
270 U.S. 266 (1926) 26, 28

U.S. v. $557,933.89,
287 F.3D AT 78 (2ND CIR. 2002) 16

U.S. v. ELDEEB,
20 F.3D 841 (8TH CIR. 1994) 16

UNITED STATES v. BALTIMORE & OHIO R. CO.,
333 U.S. 169, 176, 68 S.CT.494 (1948) 29

STATUTES/RULES
28 U.S.C. § 1254(1) 1

28 U.S.C. § 2321(a) 3

49 U.S.C., § 10102 14

49 U.S.C., § 10501(b) 1, 7, 21

49 U.S.C., §10501 3

49 U.S.C., §10901 ..... 3, 5, 25, 27, 29

49 USC § 10901(a) 1

49 U.S.C., § 11103 11

49 U.S.C.A., §1(18) 25

FRAP 28(a)(9) 15

FRAP 28(b) 15

CITATION OF THE OFFICIAL AND UNOFFICAL REPORTS

The orders entered by both the Surface Transportation Board and the U.S. Circuit Court of Appeals for the District of Columbia were unpublished.

STATEMENT OF JURISDICTION

The U.S. Circuit Court of Appeals for the District of Columbia issued its judgment on November 26, 2002. Petitioner's Petition For Panel Hearing or in the Alternative Rehearing En Banc was denied on January 10, 2003. Jurisdiction is vested in this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

49 USC, § 10901(a) reads as follows:

> (a) A person may-
> (1) construct an extension to any of its railroad lines;
> (2) construct an additional railroad line;
> (3) provide transportation over, or by means of, an extended or additional railroad line: or
> (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c).

49 U.S.C., § 10501(b) states:

(b)The jurisdiction of the Board over-

1.transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

2.the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided for under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

STATEMENT OF THE CASE

Procedural History

This appeal involves the review of the decision of the Surface Transportation Board (STB) in *B. Willis C.P.A., Inc.-Petition for Declaratory Order*, STB Finance Docket No. 34013 (served October 3, 2001). In that proceeding B. Willis, C.P.A., Inc. ("Willis") had sought a declaratory order that the railroad track constructed across its property and operated and used by the Burlington Northern and Santa Fe Railway

Company ("BNSF") is a railroad line subject to the exclusive jurisdiction of the Surface Transportation Board (STB) and for which a certificate of public convenience and necessity is required pursuant to 49 U.S.C., § 10901 before the line could be lawfully constructed, operated or used to provide transportation service over it in interstate commerce.

The STB held that it did not have jurisdiction over the track at issue on the theory that the track was a "private track" owned by Public Service Company of Oklahoma ("PSO").

Willis appealed the decision of the STB to the U.S. Court of Appeals for the District of Columbia, which had jurisdiction pursuant to 28 U.S.C. §§ 2321(a) and 2342(5). Willis asserted that the STB has exclusive jurisdiction over the track under 49 U.S.C., §10501 and that there is no such thing as a "private line exemption" as alleged by the STB in its decision. The U.S. Court of Appeals for the District of Columbia upheld the ruling of the STB.

Factual Background

PSO has a coal fired generating facility in Oologah, Oklahoma located adjacent to a main line of the Union Pacific Railroad (UP). Until the early 1990's BNSF was the only major rail carrier with track that ran to the mine from which PSO obtained its coal. However, the nearest BNSF mainline to PSO's generating facility was approximately 11 miles away. As a result, BNSF would transport the coal from the mine in Wyoming to Kansas City, Missouri. At that point the trains would be turned over to UP,[1] which transported the coal from

[1] When the arrangement began the track leading into the plant belonged to Missouri Pacific, which Union Pacific subsequently absorbed.

Kansas City to the generating facility in Oklahoma. In the early 1990's PSO began looking for ways to reduce its coal costs. BNSF offered to reduce the rate it was charging PSO if PSO would construct a railroad from BNSF's main line up to the generating station. It was agreed that PSO would construct the track instead of BNSF to "avoid potential delays at the ICC." BNSF's goal in having the track constructed was to eliminate the portion of the revenue going to its competitor. PSO agreed to construct the track when the net present value of the rate reductions it extracted from BNSF exceeded the cost of construction. Put another way, BNSF paid for the construction of the track through its rate reductions and as soon as the track was constructed BNSF took over operation of and dispatching over the track from its national operations center in Fort Worth, Texas pursuant to an "Industrial Track & Operating Agreement." BNSF transports PSO's coal in mile long unit trains that travel in a continuous journey from Wyoming to Oklahoma across as many as six (6) states. The bailment of the coal by PSO to BNSF does not terminate until after the trains travel down the track at issue and arrive at the unloading facility at the generating station.

PSO began efforts to assemble the right of way in 1992. PSO contacted Willis about obtaining a railroad easement across Willis' property and after preliminary discussions PSO sent Willis a "final offer letter" on October 2, 1992 in which PSO asserted:

> If you do not accept the sum offered, Public Service Company of Oklahoma, **AS A COMMON CARRIER**, will have no alternative but to seek, through condemnation, a Railroad Right-of-Way

> Easement across your property in Rogers County, Oklahoma. (Emphasis added.)

Willis did not accept this offer and on October 29, 1992, PSO filed a condemnation action under Oklahoma's railroad eminent domain statutes for a railroad right of way across Willis' property. When Willis challenged PSO's right to condemn the property, PSO, in flagrant violation of Willis' constitutional and statutory rights, seized the property and constructed the track and in March of 1995 BNSF began operating unit trains over the track as part of a continuous through journey in interstate commerce.

The Oklahoma Supreme Court, in June of 1997, issued a decision[2] that found the PSO's possession of Willis' property was in violation of Willis' constitutional and statutory rights and remanded the case back to the state district court for further proceedings. On June 2, 2000 PSO finally admitted in a response to a subpoena duces tecum that it did not have a certificate of public convenience and necessity from the ICC/STB to construct or operate the track. Willis then exhausted the procedures of the Oklahoma court system to have the condemnation action dismissed but was unsuccessful. Willis then brought a petition for a declaratory judgment before the STB seeking a determination that the on going state condemnation action was in violation of 49 U.S.C., §10901 under *Nicholson v. Missouri Pacific Railroad Company*, 366 ICC 69 (1982).

The STB ruled that there was no violation because it had no jurisdiction over the track because it was a "private line." Willis then appealed to the U.S. Court of Appeals for the District of Columbia, which upheld the ruling of the STB.

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[2] *Public Service Company v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997)

ARGUMENT FOR GRANTING WRIT

The writ petitioned for should be granted because the U.S. Court of Appeals for the District of Columbia has:

I. decided an important question of federal law that has not been, but should be, settled by this Court;

II. decided an important question of federal law in a way that conflicts with relevant decisions of this Court; and

III. has so far departed from the accepted and usual course of judicial proceedings and sanctioned a departure from the accepted and usual course of proceedings by an administrative agency as to call for this Court's supervisory power.

I. THE ICC TERMINATION ACT PREEMPTS STATE REGULATION OF INTRASTATE SPUR, INDUSTRIAL TEAM, SWITCHING, OR SIDE TRACKS AND GRANTS EXCLUSIVE JURIDICTION OVER SUCH TRACKS TO THE SURFACEE TRANSPORTATION BOARD, EVEN IN THE CASE OF TRACKS THAT SERVE AND/OR ARE OWNED BY ONLY ONE SHIPPER.

The ICC Termination Act of 1995 was a major rewrite of federal railroad regulatory law and reflected an intent to help revive the financial condition of the railroad industry by reducing, but not abolishing,

regulatory burdens on the industry. S. Rep. No. 176, 104th Cong., 1st Sess. 3 (1995). "By preempting state regulation of railroad operations, and granting exclusive jurisdiction over the regulation of almost all aspects of railroad operations to the STB, Congress removes the ability of states to frustrate its policy of deregulating and reviving the railroad industry." *CSX Transportation Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573 (N.D. Ga. 1996) at 1583.

One of the new statutes enacted by the ICC Termination Act is found at 49 U.S.C., § 10501(b), which states:

> (b)The jurisdiction of the Board over-
>
> 1.transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> **2.the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,**
>
> is exclusive. Except as otherwise provided in this part, the remedies provided for under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under

> Federal or State law. (Emphasis added.)

The provisions of sub-paragraph 2 were purposefully enacted. As the Court in *CSX Transportation Inc. v. Georgia Public Service Commission*, supra., at 1583 explained:

> Intrastate spur and side tracks were explicitly excluded from federal jurisdiction in the ICC Termination Act's predecessor, the Staggers Rail Act. * * *Given the states' exclusive jurisdiction over spur and side tracks under the Staggers Rail Act, it is understandable that Congress proceeded with extreme clarity in making federal jurisdiction over intrastate tracks exclusive in the ICC Termination Act.

Every decision dealing with the preemptive effect of the ICC Termination Act prior to the decision under appeal, including those by the STB, asserted that the act completely preempted state regulation of any aspect of railroad operations, including "private track" used in interstate commerce.

In *BNSF Corp. v. Anderson*, 959 F. Supp. 1288, 1295 (Dist. Mont. 1997) the Court stated:

> The ICCTA contains an express preemption clause, providing that the remedies stated hereunder with respect to regulation of rail transportation are exclusive and that those remedies preempt the remedies provided under federal or state law. **The Act reserved**

> **no area of regulation for the individual states**-agency regulation or otherwise. (Emphasis added)

The STB noted in STB Finance Docket No. 33971, *Joint Petition for Declaratory Order- Boston and Maine Corporation and Town of Ayer, Ma.*, (served May 1, 2001):

> As the court stated in CSX Trans., v. Georgia Pub. Serv. Comm'n, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996), "[I]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b).

Shortly after the ICC Termination Act took effect, the STB issued a public notice, which stated, "that the authority of certain states to regulate intrastate rail matters was terminated by the ICC Termination Act of 1995, effective January 1, 1996." STB Public Notice, Ex Parte No. 388, April 3, 1996.

Barely three (3) months before issuing the decision that lead to the present appeal, the STB issued a ruling in **STB Finance Docket No. 34020, Fletcher Granite Company, LLC- Petition for Declaratory Order (served June 29, 2001)** that dealt with a private track that only served the owning shipper and was not even used by a common carrier. The STB noted, "Fletcher laid the rail track on its property and provided its own rail service to the B&M interchange." Nonetheless, the STB made no claim that it lacked jurisdiction under a private track exemption but rather advised the parties that the STB had exclusive jurisdiction over the track.

To appreciate the importance of the issues at stake in this case it is necessary to understand two (2) points. First, frequently, spur or side tracks are privately owned and/or serve only one shipper and secondly, that there has been an explosion in construction of such private tracks in recent years. In fact, it would probably be accurate to say that construction of tracks by electric utilities, such as the track at issue here, constitute the bulk of all new railroad construction in the United States today. As one commentator observed:

> Recently a new phenomenon has been spreading through the electric utility industry: coal-burning electrics, in increasing numbers, are getting into the railroad business for themselves.[3]

In *Illinois Commerce Commission v. I.C.C.*, 879 F.2d 917 (D.C. Cir. 1989) at 919 N. 6, the Court noted:

> Comments in opposition to the petition were filed by C. Franke and Company, Inc., **the only shipper served by the spur**: (Emphasis added.)

In *New York Cent. Ry. Co. v. Southern Ry.*, 226 F.Supp. 463 (N.D. Ill. 1964), *aff'd* 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), *reh'g denied*, 381 U.S. 907 (1965) the Court noted the rail carrier:

> sends its cars for loading or unloading to the mine over track owned and maintained by the

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[3] *Do-it yourself "Electric " Coal Trains*, Avery, Donald G., Public Utilities Fortnightly, June 15, 1991

> shipper. Such service is frequently rendered over private track...
> *New York Central*, 266 F. Supp. at 474

Furthermore, 49 U.S.C., § 11103 states in part (emphasis added):

> (a) On application of the owner of a lateral branch line of railroad, or of a **shipper** tendering interstate traffic for transportation, a rail carrier providing transportation subject to the jurisdiction of the Board under this part shall construct, maintain, and operate, on reasonable conditions, a switch connection to connect that branch line or **private side track** with its railroad...

In the decision under appeal the Circuit Court of Appeals held as follows:

> The Board argues that § 10501(a) is the only provision granting the Board jurisdiction, and that § 10501(b) does not expand the Board's jurisdiction, but only renders the jurisdiction granted in § 10501(a) exclusive. Under this interpretation, which the Board made explicitly only at oral argument, the Board has jurisdiction only over common carrier track. See *Hanson Natural Resources Co.*, STB Financial Docket No. 32248, 1994 WL 673712 (Nov. 15, 1994).

In the Respondents' brief before the Circuit Court of Appeals was the assertion:

> The absence of jurisdiction under the ICA means that this private track will not enjoy the broad Federal preemption of section 10501(b) and therefore will be subject to state or local laws and regulations.

The contention of Respondents, which the Circuit Court of Appeals affirmed, is absurd on its face and contradicts the plain wording of the statute. If the "interpretation" of the Board were correct there is absolutely no reason for § 10501 (b)(2) to be in the statute and in fact such an "interpretation" reads (b)(2) completely out of the statute.

Moreover, such an interpretation completely reverses Congressional policy to completely preempt any state or local regulation of railroad operations. BNSF has attested in a sworn affidavit that without the track at issue interstate rail traffic and "millions of dollars of revenues" would be diverted from BNSF to its primary competitor, Union Pacific. However, both the STB and the Circuit Court of Appeals now assert that this track and the unit trains that travel over it as part of a through journey in interstate commerce are at the mercy and whims of state and local officials.

However, it is highly unlikely that state and local officials would attempt to regulate the track at issue. As previously noted, PSO asserted at the state and local level that it was constructing the track as a common carrier. In fact, since the track's construction it has been shown on the *Oklahoma Official Railroad Map* as

a Class III railroad.[1] As a result, if the decision under appeal is allowed to stand, the track will enjoy the status of:

> ...leaving it entirely unregulated, the public interest unprotected, and parties affected... without recourse.

Illinois Commerce Commission v. I.C.C., 879 F.2d 917, 924 (D.C. Cir. 1989)

The attempt to rely on *Hanson Natural Resources* is equally absurd. The decision was handed down in 1994 over a year prior to the effective date of the ICC Termination Act. As the Court in *CSX Transportation Inc. v. Georgia Public Service Commission*, supra., at 1583 went to great lengths to explain, the language found in § 10501 (b)(2) was deliberately inserted to reverse the previous law, which was in effect when the *Hanson* decision was issued.

Even more important, however, is that the language relied on in *Hanson* concerning private lines was pure dicta. Then Commissioner, now STB Chairman, Morgan wrote a concurring opinion in *Hanson* in which she correctly characterized the language as "gratuitous diversions into novel legal theory" and "some novel and untested legal theories-concerning for example, the classification of different kinds of railroad in general and, in particular the so-called "private line exemption.""

The reason the language in *Hanson* about a private line exemption was "gratuitous" is because it was not the issue under adjudication and therefore the statements in the decision on that subject are not

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[1] This map is published biannually by the Oklahoma Department of Transportation.

binding authority. *Kastigar v. United States*, 406 U.S. 441, 454-455, 93 S.Ct. 1653, 1662 (1972).

In essence, the theory of the STB and the Circuit Court of Appeals is that even though the track at issue is operated by BNSF under a track operating agreement and used by unit trains traveling in interstate commerce, the STB lacks jurisdiction over both the track and the interstate unit trains because the track is technically owned by the only shipper that the track serves and BNSF does not provide common carrier service to other shippers over the track. This holding, in addition to ignoring the plain wording of § 10501 (b)(2), also ignores the plain wording of 49 U.S.C., § 10102, which states in part (emphasis added):

> (6) "railroad" includes-
>
> (B) the road used by a rail carrier and owned by it **or operated under an agreement...**
>
> (9) "transportation" includes-
>
> (A)...property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, **regardless of ownership** or an agreement concerning use.

The wording and intent of the statutes is clear and unambiguous. The STB and the Circuit Court of Appeals have simply ignored the plain wording of the statutes and the intent of Congress to totally preempt the field of railroad regulation.

II. THE CIRCUIT COURT OF APPEAL HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED A DEPARTURE FROM THE ACCEPTED AND

USUAL COURSE OF PROCEEDINGS BY AN ADMINISTRATIVE AGENCY AS TO CALL FOR THIS COURT'S SUPERVISORY POWER.

The decision of the Circuit Court of Appeals is based solely on the following finding:

> The Board argues that § 10501(a) is the only provision granting the Board jurisdiction, and that § 10501 (b) does not expand the Board's jurisdiction, but only renders the jurisdiction granted in § 10501(a) exclusive. Under this interpretation, **which the Board made explicitly only at oral argument**, the Board has jurisdiction only over common carrier track. See *Hanson Natural Resources Co*, STB Financial Docket No. 32248, 1994 WL 673712 (Nov. 15. 1994). (Emphasis added.)

FRAP 28(b) states in part:

> **(b) Appellee's Brief**. Appellee's brief must confirm to the requirements of Rule 28(a)(1)-(9) and (11),...

FRAP 28(a)(9) states in part:

> (a) Appellant's Brief. Appellant's brief must contain, under appropriate headings and in the order indicated:...
> (9) the argument which must contain:
> (A) Appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies:

The Circuit Court of Appeals long ago recognized that:

> Rule 28 has been read generally as foreclosing consideration of issues not raised in briefs filed by appellants and appellees.
> *Consumer Union of United States, Inc. v. Federal Power Commission*, 510 F.2d 656 (D.C. Cir. 1974) at 662, N. 9.

This rule that an argument not raised in the brief of a party could not be belated raised at oral argument has been adopted through out the Circuits.

> Except for extraordinary circumstances not present here, a court of appeals will not consider an issue raised for the first time at oral argument.
> *Piazza v. Aponte Roque*, 909 F.2d 35, 37 (1st Cir. 1990)

> We normally do not consider arguments raised only at oral argument.
> *U.S. v. $557,933.89*, 287 F.3d at 78 (2nd Cir. 2002)

> Arguments presented for the first time at oral argument are waived.
> *Comsat Corp. v. F.C.C.*, 250 F.3d 931, 936 N. 5. (5th Cir. 2001)

> Our general rule is that "a parties failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue."
> *U.S. v. Eldeeb*, 20 F.3d 841, 843 (8th Cir. 1994)

> Durham's attorney raised three new issues at oral argument...We disregard these arguments because Durham did not raise them...in her brief. *Durham v. Xerox Corp.*, 18 F.3d 836, 841 N. 4. (10th Cir. 1994)

The reasoning behind this rule is obvious. Parties must be put on notice of the arguments of the opposing party and afforded an opportunity to respond in a brief.

> We require petitioners and appellants to raise all of their arguments in the opening brief to prevent "sandbagging" of appellees and respondents and **to provide opposing counsel the chance to respond**. *Corson and Gruman Company v. N.L.R.B.*, 899 F.2d 47, 50 N. 4. (D.C. Cir. 1990) (Emphasis added.)

See also *Charter Oil Co. v. American Employers, Ins. Co.*, 69 F.3d 1160 (D.C. Cir. 1995), *Bd. of Regents of University of Wash. v. E.P.A.*, 86 F.3d 1214 (D.C. Cir. 1996), *Students Against Genocide v. Department of State.* 257 F.3d 828 (D.C. Cir. 2001), *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982), *Carducci v. Regan*, 714 F.2d 171 (D.C. Cir. 1983), *Boggs v. Rubin*, 161 F.3d 37 (D.C. Cir. 1998).

The rule that a court of appeal will not consider an argument not made in a party's brief but raised for the first time at oral argument is also consistent with D.C. Circuit Rule 34(a), which states in part:

> (a) **Substance and Style of Oral Argument**. Oral argument should undertake to emphasize and clarify the

> written argument appearing in the briefs.

Obviously, making entirely new arguments not mentioned in the briefs is outside the intended scope of the oral argument. To base a decision on such arguments of which the opposing party had no prior notice is to deprive that party of a meaningful opportunity to be heard in rebuttal. As the U.S. Supreme Court held long ago:

> The fundamental requisite of due process of law is the opportunity to be heard...But when notice is a person's due, process which is a mere gesture is not due process. *Mullane v. Central Hanover Trust Co.*,339 U.S. 306 (1950).

In its initial brief, Willis raised the wording of § 10501 (b)(2) and further repeatedly both cited and quoted from the Surface Transportation Board's decision in Finance Docket No. 34020, *Fletcher Granite Company, LLC-Petition for Declaratory Order* (served June 29, 2001) in which the STB asserted that under the language of § 10501 (b)(2), the Board had jurisdiction over private, shipper owned track over which there was no common carrier service. In spite of the fact that Willis clearly raised the issue in its initial brief, the Board made no attempt to rebut or explain away either the plain wording of the statute or the Board's own prior decision on this issue. Instead, for the first time at the oral argument, and after Willis had completed used its allotted ten (10) minutes of argument time, the Board made an argument that completely "sandbagged" Willis and for which Willis has had no meaningful opportunity to be heard in rebuttal.

As a result, the decision of the Circuit Court of Appeals clearly violates the accepted and usual course of judicial proceedings.

The Circuit Court of Appeals furthered erred in deferring to the STB decision based on its own decision in *Oklahoma Natural Gas Co. v. FERC*, 28 F.3d 1281 (D.C. Cir. 1994). That decision, in turn, was based on this Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 104 S. Ct. 2778, 467 U.S. 837 (1984).

The Circuit Court of Appeals completely ignored the fact that *Chevron* created a two (2) pronged test.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. **First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.** If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in tne absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Chevron*, at 2781, 2782. (Emphasis added.)

This Court emphasized the same point in *Connecticut National Bank v. Germain* 503 U.S. 249, 253, 112 S.Ct.1146, 1149:

> In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there*** **When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."** (Emphasis added.)

In addressing the application of *Chevron* to the preemptive effect of the ICC Termination Act, one Court noted:

> Also, *Chevron* is only applicable "where the plain meaning of the express terms of a statute is unclear." *** Because the Court finds that Congress has spoken directly to the issue of the preemptive effect of the ICC Termination Act, the *Chevron* framework is irrelevant.

CSX Transportation Inc. v. Georgia Public Service Commission, supra., at 1584.

There is nothing about § 10501 (b) that is ambiguous or delegates to the STB the authority to grant the state and local authorities jurisdiction over track

that is used by complete unit trains in a continuous, through journey in interstate commerce. In fact, it is the interpretation of the Board that is implausible on its face. 49 U.S.C. § 10501 (b) states:

> The jurisdiction of the Board over-
> 1.transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
> 2.**the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,**
> is exclusive. Except as otherwise provided in this part, the remedies provided for under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law. (Emphasis added).

Nowhere does it say "except if owned by shpper."

The Circuit Court of Appeals further departed from the accepted and usual course of judicial

proceedings by allowing the STB to ignore its own prior decisions without any explanation.

Barely three (3) months before issuing the decision that lead to the present appeal, the STB issued a ruling in **STB Finance Docket No. 34020, Fletcher Granite Company, LLC- Petition for Declaratory Order (served June 29, 2001)** that dealt with a private track that only served the owning shipper and was not even used by a common carrier. The STB noted, "**Fletcher laid the rail track on its property and provided its own rail service to the B&M interchange.**" (Emphasis added.) Nonetheless, the STB made no claim that it lacked jurisdiction under a private track exemption but rather advised the parties that the STB had exclusive jurisdiction over shipper owned track over which there was no common carrier service. The track at issue in the case at bar is used by complete, unit trains in interstate commerce but the STB claims that it has no jurisdiction.

In its decision, the STB made no attempt to explain this obvious contradiction or give any reason for a change in its policy.

In *Baltimore & Annapolis R. v. Wash. Metro Area Tran.*, 642 F2d 1365, 1371 (D.C. Cir. 1980) the Court stated:

> Given the comparative novelty of the conclusion...and its lack of consistency with a prior Commission ruling, we find ourselves obliged to do more than merely defer to the Commission's conclusion... We must make **an independent judgment**, examining with a more exacting vigilance than we might have employed had the Commission's decision not conflicted. A **demanding judicial**

> **review** is also indicated by the consequences of the Commission's latest interpretation..."[e]fforts of an administrator or administrative agency to enlarge or restrict the application of a statute should be subjected to **close scrutiny**."* * * (Emphasis added.)

In *Office of Com. Of United Church of Christ v. F.C.C.*, 707 F.2d 1413, 1425 (D.C. Cir. 1983) the Court stated:

> While we do not then challenge the Commission's theoretical right to modify, or even overrule, long-standing precedents, such abrupt shifts in policy constitute **"danger signals" that the Commission may be acting inconsistently with its statutory mandate**. We will require therefore that the Commission provide a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored* * *" (Emphasis added.)

In *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 851, 852 (D.C. Cir. 1970) the Court stated:

> Its supervisory function calls on the court to intervene not merely in case of procedural inadequacies, or bypassing of the mandate in the legislative charter, but more broadly if the court becomes aware, especially from a combination of **danger signals**, that the agency has not really

> taken a "hard look" at the salient problems, and **not genuinely engaged in reasoned decision-making**...But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored and if agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute. (Emphasis added.)

As previously noted, prior to the decision under appeal, the Board repeatedly held that it had exclusive jurisdiction over all track that was part of the general railroad system of transportation, even if in cases where the track was privately owned with no common carrier service over it. STB Finance Docket No. 33466, *Borough of Riverdale-Petition for Declaratory Order-The New York Susquehanna and Western Railway Corporation*, (served February 27, 2001); STB Finance Docket No. 33971, *Joint Petition for Declaratory Order-Boston and Maine Corporation and Town of Ayer, Ma.*, (served May 1, 2001); STB Finance Docket No. 34020, *Fletcher Granite Company, LLC-Petition for Declaratory Order* (served June 29, 2001). As a result, the STB decision under appeal clearly contradicts the Board's prior decisions without explanation and attempts to restrict the application of a statute, 49 U.S.C. § 10501 (b)(2).

This in turn, under the prior decisions of the Circuit Court of Appeals, triggered a requirement for denovo review. Because the Circuit Court of Appeals' decision merely "rubber stamped" an agency "interpretation" that contradicts not only the plain wording of the statute, but the STB's prior decisions on the same issue without explanation, both the Circuit

Court of Appeal and the STB have departed from the accepted and usual course of judicial proceedings.

III. THE TRACK AT ISSUE IS A LINE OF RAILROAD SUBJECT TO THE REQUIREMENTS OF 49 U.S.C., §10901.

The statutes requiring prior approval by the ICC before railroad track to be used in interstate commerce could be constructed was originally enacted as part of the Transportation Act of 1920 and codified as 49 U.S.C.A., §1(18). Under the statutory scheme track that was considered a "line of railroad" or main line track could not be constructed without a certificate of public convenience and necessity from the ICC. Track that was considered spur, industrial, switching or sidetrack was exempt from this requirement and thus outside of federal jurisdiction. However, the statutes did not define the difference between "railroad line" and "spur, industrial, switching and side track." In *Nicholson v. Missouri Pacific Railroad Company*, 366 ICC 69, 72 (1982) the ICC stated, "The term "railroad line" is not defined in the act nor is the legislative history helpful in resolving the issue... Accordingly, we must look to case law and common sense..."

Courts have developed several different tests to classify track as either main line or spur track but two tests have been relied on most frequently: the use of the tracks by complete trains as part of a continuous through movement in interstate commerce and the use of the track by a railroad to extend its operations into an area already served by another carrier. In *Nicholson v. I.C.C.*, 711 F2d 364 (D.C. Cir. 1983) the Court gave a comprehensive summation of the law:

> It is well established that the determination of whether a particular track segment is a "railroad line," requiring

commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side" track, exempt from Commission jurisdiction pursuant to 10907(b**), turns on the intended use of the track segment**, not on the label or cost of the segment. It was held early on that it is sufficiently plain, from a consideration of the obvious purpose prompting the [Interstate Commerce Act] but also of the general nature of the tracks mentioned, that **Congress intended *to subject to the requirements of [section 1(18)]* so-called main or branch lines of railroad, that is, *lines designed and used for continuous transportation service by through, full trains between different points of travel*...** Shortly thereafter, the Supreme Court held that:

[I] f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of [section 1(18) of the Act], although the line be short and although the character of the service contemplated be that commonly rendered...by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry. 270 U.S. 266, 278, 46 Sp. Ct. 263, 266, 70 L.Ed.578 (1926)...**Thus it can be seen that track segments which are intended to be used to carry through**

> **trains between points of shipment and delivery,** particularly those segments which extend a railroad's service into new territory, **must be approved by the Commission pursuant to section 10901(a).**

Nicholson v. I.C.C., supra at 367,368. (Bold emphasis added.)

The classification of track as requiring a certificate if used by complete through trains has been adopted in a number of circuits. See *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 612 (3d Cir. 1991), *Railway Labor Exec. Ass'n v. City of Galveston, Texas*, 849 F.2d 145, 148 (5th Cir. 1988), *New Orleans Terminal Company v. Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966), I.C.C. *v. Memphis Union Station Company*, 360 F.2d 44, 50,51(6th Cir. 1966), *Brotherhood of Locomotive Engineers v. U.S.*, 101 F.3d 718, 729,730 (D.C. Cir. 1996).

Moreover, track that meets the extension of service test falls under the purview of 49 U.S.C. § 10901 even if the track would otherwise be considered spur or industrial track.

> If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks. Being an extension, it cannot be built unless the federal Commission issues its certificate that

> public necessity and convenience require its construction.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry. 270 U.S. 266, 278, 46 Sp. Ct. 263, 266, 70 L.Ed.578 (1926)

> In the cases before us, for example, although the ICC may focus on the tenant railroad's use of the tracks solely for switching operations as the controlling factor in determining the tracks' character, if those switching operations have the effect of substantially extending the tenant railroads' lines into new territory, ther the Commission may not decline jurisdiction.

Brotherhood of Locomotive *Engineers v. U.S.*, 101 F.3d 718, 728 (D.C. Cir. 1996)

The track at issue was constructed at the instigation of BNSF and financed by it through rate reductions. Its only purpose is allow BNSF to invade UP's service area and divert "millions of dollars of revenues" from its main competitor to itself. The claim that BNSF and PSO can completely circumvent the entire scheme of federal railroad regulation by the simple subterfuge of having PSO build the track and then turn it over to BNSF under a track operating agreement is absurd. As the U.S. Supreme Court has stated:

> The mere fact that a railroad lies wholly within one state, and is to be built by an independent corporation, does not of course, prevent the application of paragraphs 18 to 22. If it undertakes to engage in interstate commerce, its operation becomes immediately a matter

> of national concern and it comes within the purview of those paragraphs.
> *Texas & N.O.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 48 S. Ct. 361, 362 (1928).

> ...Congress did not intend its railroad regulatory provisions to depend on who had legal title to transportation instrumentalities...these definitions by their unambiguous language, make all trackage "in use by a common carrier" subject to the regulatory provisions of the Act, even though not owned by the carrier, but only used by it under a contract or agreement.

United States v. Baltimore & Ohio R. Co., 333 U.S. 169, 176, 68 S.Ct.494, 498 (1948).

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed as it directly contradicts the plain wording of the applicable statutes and all relevant prior decisions of the United States Supreme Court, the D.C. Circuit, the ICC and the STB itself. The track at issue and BNSF's interstate operations over it are subject to the jurisdiction of the STB and 49 U.S.C., §10901 and the ongoing state condemnation action is a violation of that statute the STB is charged with enforcing.

Respectfully submitted,

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1369 South Garnett

30

Tulsa, Oklahoma 74128
918-629-0449

(Any footnotes trail the end of each document.)
No. 01-1441

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. WILLIS, C.P.A., INC.,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD AND
UNITED STATES OF AMERICA,
RESPONDENTS

PUBLIC SERVICE COMPANY OF OKLAHOMA D/B/A
AMERICAN ELECTRIC POWER COMPANY, INC., AND
BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY,

INTERVENORS

FILED NOVEMBER 26, 2002

Petition for Review of an Order of the Surface Transportation Board

Before: RANDOLPH and ROGERS, Circuit Judges, and WILLIAMS, Senior Circuit Judge.

JUDGMENT

This cause was considered on the record from the Surface Transportation Board and on the briefs filed by the parties and oral arguments of counsel. It is

ORDERED AND ADJUDGED that the petition for review be denied.

Under 42 U.S.C. § 10501, "the Board has jurisdiction over transportation by rail carrier," id. § 10501(a)(1); moreover, the Board's jurisdiction over "the construction . . of spur tracks . . . is exclusive," id. § 10501(b)(2). A "rail carrier" is defined as "a person providing common carrier railroad transportation for compensation." Id. § 10102(5).

The Board argues that § 10501(a) is the only provision granting the Board jurisdiction, and that § 10501(b) does not expand the Board's jurisdiction, but only renders the jurisdiction granted in § 1 050 1(a) exclusive. Under this interpretation, which the Board made explicitly only at oral argument, the Board has jurisdiction only over common carrier track. See Hanson Natural Resources Co. , STB Financial Docket No. 32248, 1994 WL 673712 (Nov. 15, 1994). Willis contends that § 10501(b)(2) confers upon the Board jurisdiction over all track, regardless whether it is used for private or common carriage. This interpretation is implausible on its face, and the Board, in determining that it has no jurisdiction over private tracks, has rejected it. See Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1284 (D.C. Cir. 1994). We therefore agree that the Board does not have jurisdiction over this dispute.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. See FED. R. APP. P. 41(b); D.C. CIR. R.41.

Per Curiam
FOR THE COURT:

Mark J. Langer, Clerk

BY:
Dorothy E. Barrack
Deputy Clerk

SERVICE DATE - OCTOBER 3, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34013
B. WILLIS, C.P.A., INC. —
PETITION FOR DECLARATORY ORDER

Decided: October 1, 2001

On February 15, 2001, B. Willis, C.P.A., Inc. (petitioner), filed a petition seeking a declaratory order that certain railroad track — constructed across its property by Public Service Company of Oklahoma d/b/a American Electric Power Company (PSO) and used by The Burlington Northern and Santa Fe Railway Company (BNSF) — is a line of railroad and as such cannot lawfully be constructed or operated without first obtaining authority from the Board under 49 U.S.C. 10901. Replies to the petition have been submitted by BNSF and PSO. On August 30, 2001, and September 4, 2001, petitioner filed motions for expedited adjudication to which PSO and BNSF have jointly replied. For the reasons discussed below, the petition will be denied and a declaratory order proceeding will not be instituted.

Preliminary Matter. Petitioner has tendered responses to the PSO and BNSF pleadings, claiming that those pleadings are actually motions to dismiss its petition. BNSF and PSO have jointly moved to strike the petitioner's tendered replies, on the ground that they are nothing more than replies to the replies and as such are

prohibited under the Board's Rules of Practice at 49 CFR 1104.13(c).

Under 49 CFR 1104.13(a), parties can file replies or motions within 20 days after a pleading is filed. PSO and BNSF timely filed what each termed a "reply." Petitioner claims that, because those pleadings use terms such as "summarily reject," "forthwith to dismiss," and "decline . . . to reach the merits," they are actually motions to dismiss. There is no need to resolve this issue because, given the decision reached here on the petition for declaratory order, no party will be prejudiced by acceptance of petitioner's replies. The joint motion to strike will thus be denied.

Background. Petitioner owns a tract of land in Rogers County, OK. In October 1992 PSO filed an eminent domain proceeding pursuant to State law to condemn, inter alia, a right-of-way across this tract of land, for the purpose of constructing railroad track over which BNSF would move unit coal trains to and from PSO's electric power generating facility at Oologah, OK. (This facility is located on or adjacent to a main line of the Union Pacific Railroad Company, which handled coal deliveries until the track connection to BNSF's line was constructed.) PSO took possession of the right-of-way in March 1994 and constructed the railroad track, which connects the Oologah plant to BNSF's main line. BNSF began using the track in March 1995.

Petitioner is challenging PSO's use of eminent domain power to condemn its property in the State courts, on grounds, inter alia, that the condemnation was not for a lawful public purpose. The Oklahoma Supreme Court has remanded that matter to the Rogers County District Court for hearing on this issue. Public Service Company v. B.

Willis, C.P.A., Inc., 941 P.2d 995 (Okla. 1997). PSO maintains that a shipper can build a private track without Board approval. BNSF also takes the position that the track is either private track or a spur and that in either event construction and operation of this track do not require Board authorization.[1]

Discussion. Under 5 U.S.C. 554(e), the Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty where the Board has subject-matter jurisdiction.[2] Here, the request for a declaratory order will be denied because the record indicates that the track at issue is private track and thus does not require authorization by the Interstate Commerce Commission (ICC) (prior to January 1, 1996) or the Board (on or after that date) for its construction or operation.[3]

Under the statute, the Board has jurisdiction over "transportation by rail carrier," 49 U.S.C. 10501(a)(1), with the term "rail carrier" defined as "a person providing common carrier railroad transportation for compensation," 49 U.S.C. 10102(5). The agency's

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[1] BNSF also argues that the petition filed with the Board is untimely, violating the doctrine of laches, and is a collateral attack on the State court condemnation proceeding. These arguments need not be reached in view of the substantive conclusions here regarding the status of the line.

[2] The responsibility of whether to institute requested declaratory order proceedings has been delegated by the Board to the Director of the Office of Proceedings. See 49 CFR 1011.8(c)(6).

[3] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress abolished the ICC and transferred the remaining rail regulatory responsibilities to the Board, effective January 1, 1996.

jurisdiction does not extend to private rail operations (those not operated for hire). This was also true of the ICC's jurisdiction over rail carriers before passage of ICCTA.[4]

In other words, there is a category of rail operations that falls outside the Board's statutory jurisdiction. It consists of private tracks, typically built and maintained by a shipper (or for a shipper at the shipper's expense) and operated by the shipper (or its contractor) to serve only that shipper, moving the shipper's own goods, so that there is no "holding out" to serve other shippers for compensation. Private tracks constitute a narrow, limited category of rail operations. But as long as rail track is constructed and operated in a manner that does not constitute common carriage, rail track can be built and operated in private status not subject to the Board's jurisdiction.

Under 49 U.S.C. 10901(a), an extension to a railroad line or an additional railroad line may be constructed only with Board authorization. However, this applies only to railroad lines that are subject to the agency's jurisdiction — not private tracks. See Hanson Natural Resources

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[4] The ICCTA Conference Report explains, at 166: "To clarify that only providers of rail transportation for compensation are within the scope of the statute, the definition of 'rail carrier' is limited to persons providing *common carrier* rail transportation." H.R. Rep. No. 422, 104th Cong., 1st Sess. (1995) (Conference Report).

Company — Non-Common Carrier Status — Petition for Declaratory Order, ICC Finance Docket No. 32248 (ICC served Dec. 5, 1994) at 20-21 (Hanson).

Operations over private tracks can be conducted by the shipper/owner itself, or the shipper/owner of the private track may arrange for a contractor to conduct operations over the track. As noted in Hanson, in New York Cent. R. Co. v. Southern Ry., 226 F. Supp. 463 (N.D. Ill. 1964), aff'd, 338 F.2d 667 (7th Cir. 1964), cert. denied, 380 U.S. 954 (1965), reh'g denied, 381 U.S. 907 (1965) (New York Central), the court indicated that a common carrier operating over private track would not fall under the statutory requirements of what is now section 10901 with respect to those operations, so long as it does not perform common carriage service on the private track and it does not maintain that track with its own funds.[5]

Here, PSO submitted a verified statement stating that it paid all of the construction cost of the track and owns it. It also asserts that it has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service

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[5] Petitioner cites United States v. B. & O. R. Co., 333 U.S. 169 (1947), for the proposition that the ICC/Board's jurisdiction applies even when noncarriers construct track that is used in interstate commerce. That case is distinguishable because th e common carrier railroad served shippers other than the owner of the track, and thus the track could not be considered private. Also, petitioner claims, citing Staten Island Rapid Transit Op. Auth. v. ICC, 718 F.2d 533 (2d Cir. 1983) (SIRTOA), that, because BNSF controls the PSO track, it is a BNSF line under ICC/Board jurisdiction. SIRTOA is not on point. It involved a determination as to whether an entity providing passenger service was a carrier within the meaning of the Railway Labor Act. It did not involve the distinction between private track and common carrier lines.

over the line to any other shipper. V.S. Cox at 4-5. Moreover, under the New York Central analysis, PSO states that BNSF does not own the line in fee or through an easement, does not spend its funds to maintain the line, and serves only PSO, which is the only shipper that is able to receive shipments on the line.

Petitioner asserts that, under the Supreme Court's decision in Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926), the construction of an extension to a rail line, or an additional rail line, that enables a railroad to penetrate or invade new territory falls under the agency's jurisdiction under section 10901. The "invade new territory" test, however, is not applicable to private track, which is outside the agency's jurisdiction.

Petitioner cites Public Service Company of Colorado - Construction Exemption - Pueblo County, CO, STB Finance Docket No. 33862 (STB served Aug. 23, 2000), where track constructed by the Public Service Company of Colorado (PSCo) was found to come under the Board's section 10901 jurisdiction. In that proceeding, however, the Board noted, at 4, that "[w]hile PSCo will be the only shipper served by the line, PSCo states that other shippers would be permitted to use the rail line in the future should a demand arise." Thus, PSCo was holding out potential service to other shippers, and thus the track was not private track.

Finally, petitioner quotes Nicholson v. Missouri Pacific Railroad Company, 366 I.C.C. 69 (1982) (Nicholson), aff'd sub nom. Nicholson v. ICC, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984), for the proposition that a condemnation proceeding triggers the licensing requirements of section 10901. However, the ICC in that proceeding was examining operations that were

subject to its jurisdiction.[6] Nicholson has no application to private track.

Fundamentally, the controversy between petitioner and PSO is a question of eminent domain powers under State law, and not an issue for the Board. The question of whether PSO, as a public utility, may exercise eminent domain powers under the laws of the State of Oklahoma to construct a private line to serve its own facility is a question that arises, and must be answered, under State law. But as far as this agency is concerned, if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval.

Conclusion. Accordingly, the declaratory relief requested will not be granted and a proceeding will not be instituted.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a declaratory order is denied.

2. The joint motion to strike is denied.

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[6] In Nicholson, the ICC ultimately concluded that its authorization was not needed for construction of the track because it was yard track, which came within the licensing exce ption of former 49 U.S.C. 10907 (now 49 U.S.C. 10906).

3. This decision is effective on its service date.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams

Secretary

No. 01-1441

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. WILLIS, C.P.A., INC.,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD AND
UNITED STATES OF AMERICA,
RESPONDENTS

PUBLIC SERVICE COMPANY OF OKLAHOMA D/B/A
AMERICAN ELECTRIC POWER COMPANY, INC., AND
BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY,

INTERVENORS

FILED JANUARY 10, 2003

BEFORE: Randolph and Rogers, CircuitJudges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing filed December 23, 2002, it is

ORDERED that the petition be denied.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

No. 01-1441

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

B. WILLIS, C.P.A., INC.,
PETITIONER

v.

SURFACE TRANSPORTATION BOARD AND
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PUBLIC SERVICE COMPANY OF OKLAHOMA D/B/A
AMERICAN ELECTRIC POWER COMPANY, INC., AND
BURLINGTON NORTHERN AND SANTA FE RAILWAY
COMPANY,

INTERVENORS

FILED JANUARY 10, 2003

BEFORE: Ginsburg, Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges, and Williams, Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

(2)

Supreme Court, U.S.
FILED
JUN 13 2003
OFFICE OF THE CLERK

No. 02-1498

IN THE

Supreme Court of the United States

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD,
UNITED STATES OF AMERICA, ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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Counsel for Respondent
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June 13, 2003

*Counsel of Record

47 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Surface Transportation Board have jurisdiction over private trackage prior to passage of the ICC Termination Act of 1995?

2. Did the Preemption Provision of the ICC Termination Act of 1995 extend the Surface Transportation Board's jurisdiction to private trackage?

3. Does the appellate court's decision suffer from any procedural errors?

PARTIES TO THE UNDERLYING PROCEEDING

Petitioner in the underlying proceeding was B. Willis, C.P.A., Inc. ("Willis"). In addition, the following parties in the underlying proceeding had interests that were adverse to Willis: The Surface Transportation Board ("STB" or "Board"), the United States of America, Public Service Company of Oklahoma doing business as American Electric Power ("PSO"), and The Burlington Northern and Santa Fe Railway Co. ("BNSF").

Respondent PSO is a public utility corporation which markets energy and energy-related services in eastern and southwestern Oklahoma, and is a wholly-owned subsidiary of AEP Utilities, Inc. (formerly Central and South West Corporation). AEP Utilities is controlled by American Electric Power Company, Inc. based in Columbus, Ohio which is engaged principally in generating, marketing, and trading energy.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE UNDERLYING PROCEEDING ii

TABLE OF CITED AUTHORITIES iv

OPINIONS OF THE COURT OF APPEALS AND THE SURFACE TRANSPORTATION BOARD ... 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

I. The STB Does Not Have Jurisdiction Over Private Track 7

II. The Preemption Provision of ICCTA Did Not Extend The STB's Jurisdiction To Private Lines 12

III. The Appellate Court's Decision Does Not Suffer From Any Procedural Errors 15

CONCLUSION 18

APPENDIX

TABLE OF CITED AUTHORITIES

Page(s)

CASES:

Atchison, Topeka & Santa Fe Ry. v. Kan. City Stock Yards Co., 33 I.C.C. 92 (1915) 7

B. Willis, C.P.A., Inc. v. Burlington N. R.R., No. 96-CV-059-E (N.D. Okla. 1997), *aff'd* 182 F.3d 931 (10th Cir. 1998), cert. denied, 528 U.S. 1003 (1999) 5

B. Willis, C.P.A., Inc. v. Goodpaster, 183 F.3d 1231 (10th Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999) 5

B. Willis, C.P.A., Inc. – Petition for Declaratory Order, Finance Docket No. 34013, S.T.B. Served Oct. 3, 2001 .. 10

Boeing Company – Acquisition and Operation Exemption – Chehalis Western Railway Company, Finance Docket No. 31916, I.C.C. Served Oct. 24, 1991 ..... 9, 10

Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp., Finance Docket No. 33466, S.T.B. Served February 27, 2001 17

Burlington N. Santa Fe Corp. v. Anderson, 959 F. Supp. 1288 (D. Mont. 1997) 13

Comsat Corp. v. F.C.C., 250 F.3d 931 (5th Cir. 2001) 15

CSX Transp., Inc., v. Georgia Public Service Comm'n,

944 F. Supp. 1573 (N.D. Ga. 1996) 13

Fletcher Granite Company, LLC – Petition for Declaratory Order, Finance Docket No. 34020, S.T.B. Served June 29, 2001 17

Hanson Natural Resources Company – Non-Common Carrier Status – Petition for a Declaratory Order, Finance Docket No. 32248, I.C.C. Served Dec. 5, 1994 . . . . . 7, 9, 11, 13, 17

Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, Ma., Finance Docket No. 33971, S.T.B. Served May 1, 2001 17

New York Cent. R.R. v. S. Ry., 226 F. Supp. 463 (N.D. Ill. 1964), *aff'd*, 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965) 7-11, 13

Northern Plains Railroad Company – Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT, Finance Docket No. 32077, I.C.C. Served Dec. 28, 1992 9

State of Vermont & Vt. Ry., Acquisition and Operation in Vt., 320 I.C.C. 609 (1964) 7

Status of Bush Universal, Inc., 342 I.C.C. 550 (1973) 7

Tap Line Case, 23 I.C.C. 277 (1912) 7

Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry., 270 U.S. 266 (1926) 8

Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994),

reh'g and suggestion for reh'g denied, cert. denied, 514 U.S. 1004 (1995) 16

STATUTES:

28 U.S.C. § 1254 (2003) 1

28 U.S.C. § 2350 (2003) 1

49 U.S.C. § 10102 (2002) 1, 7, 16, A-10-11

49 U.S.C. § 10501 (2002) 1, 6, 7, 12-17, A-12-13

49 U.S.C. § 10901 (2002) 1, 5, 9, 10, 12, 14, 16, 17, A-14-15

49 U.S.C. § 10903 (2002) 9

49 U.S.C. § 10906 (2002) (former 49 U.S.C. § 10907) 1, 9, 10, 14, 17, A-16

D.C. Cir. R. 34(a). 1, A-17-18

Okla. Stat. Ann. tit. 66 §53 (West 2003) 1, 3, A-19-20

LEGISLATIVE MATERIALS:

H.Rep. 104-422, *Conference Report on the ICC Termination Act of 1995* (Dec. 18, 1995) 14

ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 12-15

MISCELLANEOUS:

Black's Law Dictionary (7th ed. 1999) 7

OPINIONS OF THE COURT OF APPEALS AND THE SURFACE TRANSPORTATION BOARD

The November 26, 2002 *per curiam* disposition of the Court of Appeals for the District of Columbia Circuit, not officially reported, is set forth at page 1a of the Appendix to the Petition ("Pet. App."). The STB's decision in its Docket No. 34013, *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, S.T.B. Served Oct. 3, 2001, denying declaratory relief is located at Pet. App. at 4a. The STB denied Willis's petition to reopen in Docket No. 34013, *B. Willis, C.P.A., Inc. – Petition for Declaratory Order*, S.T.B. Served July 26, 2002, which is attached hereto in the Appendix to Respondent PSO's opposition ("App.") at A-1. The court of appeals denied Willis's petitions for rehearing and for rehearing *en banc* on January 10, 2003. These orders are set forth in Pet. App. at 12a - 14a.

JURISDICTION

The court of appeals entered judgment on Willis's petitions for rehearing and rehearing *en banc* on January 10, 2003. The Petition for Writ of Certiorari is thus timely filed under 28 U.S.C. § 2350 (2003). Jurisdiction lies under 28 U.S.C. § 1254(1) (2003).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are set out verbatim in the Appendix as follows:

49 U.S.C. § 10102 (2002) A-10
49 U.S.C. § 10501 (2002) A-12
49 U.S.C. § 10901 (2002) A-14
49 U.S.C. § 10906 (2002) A-16
D.C. Cir. R. 34 ..... A-17
Okla. Stat. Ann. tit. 66 § 53 (West 2003) A-19

STATEMENT OF THE CASE

Prior to 1995, PSO's Northeast Generating Station located near Oologah, Oklahoma, was served by only one railroad, the Missouri Pacific Railroad Company ("MP"). However, the Burlington Northern Railroad Company ("BN"),[1] owned and operated a rail line located less than ten miles away. In 1994-95, in order to obtain direct service from BN as a competitive alternative to MP, PSO built a new track—the private trackage at issue in this proceeding—approximately 9.8 miles in length from the Northeast Station out to a connection with BN's line near Claremore, Oklahoma.

The new track was planned and constructed as a private track and has always been operated as such. The track was constructed under PSO's direction and at its expense by a private contractor. It is, and always has been, owned by PSO. Likewise, the cost of maintaining the track is, and always has been, borne entirely by PSO, which has arranged for the maintenance work to be performed by a private contractor. The track is used exclusively for PSO's coal traffic; no traffic for any other shipper has ever been moved over the track. PSO is not a common carrier by rail and has never held out to provide rail transportation over its private track to any party.

Since the PSO private trackage was completed, BN/BNSF has provided service over it pursuant to an Industrial Track and Operating Agreement entered into in March 1995. BN/BNSF has never compensated PSO for the use of the track or paid for maintenance of the track. BNSF has no authority to provide service over the track to any other

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[1] BN merged in 1996 with the Atchison, Topeka & Santa Fe Railway Company and its successor is BNSF.

shipper.

PSO, a unit of American Electric Power Company, is an investor-owned electric utility. PSO began to acquire right-of-way for the track to serve Northeast Station in 1992.

A very small part of the route for the private track crossed property owned by Willis.[2] When attempts to purchase right-of-way from Willis failed, PSO filed a condemnation proceeding.[3] Per statutory and constitutional procedures, Commissioners were appointed to determine the amount of just compensation to be paid.[4] PSO paid the amount of the Commissioners' award into the court which entitled PSO to enter upon the property and begin construction.[5] Willis filed an Exception to the Commissioners' Report, which included numerous objections; however, Willis did not claim at that time that PSO was required to obtain approval from the Interstate Commerce Commission ("ICC") (now the STB) before condemning land for the track's right-of-way or constructing the trackage.[6]

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[2] The total area of the right-of-way on Willis's property needed for the trackage is 4.18 acres.

[3] *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, No. CJ-92-507 (Rogers County D. Ct. filed Oct. 29, 1992).

[4] Okla. Stat. Ann. tit. 66, § 53 (West 2002). The Report of Commissioners was filed with the Rogers County Court on December 28, 1992.

[5] The amount of the award was $49,920.00.

[6] The underlying case is now on remand to the state trial court on procedural and discovery-related issues. *See Public Serv. Co. of Okla. v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997).

Shortly after the Oklahoma condemnation case was filed, a series of procedural motions, appeals, and applications for original jurisdiction to the Supreme Court of Oklahoma ensued. After Willis threatened to interfere with the construction of the track, PSO was forced to obtain a temporary restraining order in which the court stated that "[PSO] has a presently existing statutory right to use and possession of the railroad spur" and "entry of the requested relief is necessary to avoid irreparable harm to [PSO] and those members of the public relying upon electrical power from [PSO's] Northeast Station."

Willis has also initiated a spate of collateral litigations, including no less than six applications to the Supreme Court of Oklahoma for extraordinary relief while the condemnation suit was pending in the trial court.[7] Willis also filed two separate lawsuits in federal court, one of which added BN as

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[7] None of these cases resulted in an opinion, published or unpublished, and all were terminated by order of the court. The Supreme Court of Oklahoma case number, date of filing, and order of the court are as follows: (1) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 83,691 (filed June 8, 1994) (Okla. 1996), Application to Assume Original Jurisdiction Denied; (2) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 90,105 (filed Sept. 24, 1997) (Okla. 1997), Application to Assume Original Jurisdiction Denied; (3) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 90,432 (filed Nov. 21, 1997) (Okla.1997), Application to Assume Original Jurisdiction Denied; (4) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 91,865 (filed Sept. 9, 1998) (Okla. 1998), Application to Assume Original Jurisdiction Denied; (5) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 92,562 (filed Feb. 4, 1999) (Okla. 1999), Application to Assume Original Jurisdiction Denied; and (6) *B. Willis, C.P.A., Inc. v. Goodpaster*, No. 95,652 (filed Dec. 21, 2000) (Okla. 2000), Application to Assume Original Jurisdiction Denied.

a defendant,[8] which raised the same ICC/STB approval argument Willis is raising here, and lost. *B. Willis C.P.A., Inc., v. Burlington N. R.R.*, No. 96-CV-059-E (N.D. Okla. 1997), *aff'd* 182 F.3d 931 (10th Cir. 1998), *cert. denied*, 528 U.S. 1003 (1999). Willis brought another action in federal district court against the Oklahoma State court judge involved in the condemnation proceeding, PSO, and others, alleging civil rights violations, i.e., that an injunction issued by the state trial court (after Willis wrote a letter threatening to interfere with operation of the track) violated Willis's free speech rights. The federal district court's dismissal of those claims was upheld, in *B. Willis, C.P.A., Inc. v. Goodpaster*, 183 F.3d 1231 (10th Cir. 1999), *cert. denied*, 528 U.S. 1046 (1999). As the above citations reflect, Willis has petitioned this Court to accept certiorari on matters related to the present petition on two prior occasions. In both instances certiorari was denied.

Willis did not raise the issue of ICC/STB authorization for construction of the track at the agency until more than eight years after the beginning of the condemnation proceeding. Following Willis's sixth unsuccessful application to the Supreme Court of Oklahoma, he commenced this case before the STB. In February 2001, Willis filed a Petition for Declaratory Order with the STB requesting that the Board declare that the track at issue required a regulatory license or certificate under 49 U.S.C. § 10901 (2002) before it could be lawfully built and operated. After receiving oppositions from PSO and BNSF, the Board denied Willis's request on October 3, 2001 on the ground that

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[8] Case No. 96-CV-059-E (*Willis v. PSO*) and Case No. 96-CV-172-H (*Willis v. PSO and BN*), in the United States District Court for the Northern District of Oklahoma, the cases were consolidated under No. 96-CV-059-E.

the track and operations at issue are not subject to the STB's jurisdiction. In June 2002, Willis petitioned the STB to reopen and reverse its prior decision. The STB denied this request on July 26, 2002.

On October 9, 2001, Willis petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the STB's October 3, 2001 decision. After briefing and oral argument by the parties, the court of appeals upheld the STB's determination that the Board does not have jurisdiction over this dispute. Pet. App. at 1a - 3a. On December 23, 2002, Willis filed a Petition for Panel Rehearing or in the Alternative Rehearing En Banc with the court of appeals. On January 10, 2003, the court of appeals denied Willis's petitions for rehearing and rehearing *en banc* in two *per curiam* orders. Willis's Petition for Certiorari followed.

REASONS FOR DENYING THE WRIT

Willis's Petition for Certiorari should be denied because the decision below was based upon a proper interpretation of the statute consistent with applicable precedent. Willis ignores governing precedent and relies upon inapposite authorities to support his position. The issue at hand is whether the track that PSO built for itself to handle only its own coal trains is subject to the Board's jurisdiction. The court of appeals made a proper decision based on sound and well-reasoned precedent and a fair reading of 49 U.S.C. § 10501 (2002), accepting the STB's determination that it does not have jurisdiction. Willis's Petition for Writ of Certiorari should be denied.

I. THE STB DOES NOT HAVE JURISDICTION OVER PRIVATE TRACK

The Board's general grant of jurisdiction is found at 49 U.S.C. § 10501(a)(1) (2002) which states that the STB has "jurisdiction over transportation by rail carrier...." Rail carrier is defined at 49 U.S.C. § 10102(5) (2002) as " a person providing common carrier railroad transportation for compensation". The phrase "common carrier" is not defined in the statute, but it has long been established that a critical determinant of whether an entity provides common carrier services is whether it holds itself out to provide service to the general public. *See, e.g., Status of Bush Universal, Inc.*, 342 I.C.C. 550, 564 (1973); *State of Vermont & Vt. Ry., Acquisition and Operation in Vt.*, 320 I.C.C. 609, 611-12 (1964); *Atchison, Topeka & Santa Fe Ry. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92, 100 (1915); *Tap Line Case*, 23 I.C.C. 277, 292 (1912); and *Black's Law Dictionary* 205 (7th ed. 1999).

This holding out element is, therefore, a fundamental test for whether rail trackage constitutes a common carrier facility subject to the Board's jurisdiction. *See New York Cent. R.R. v. S. Ry.*, 226 F. Supp. 463 (N.D. Ill. 1964) *aff'd*, 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965) ("*New York Central*") and Finance Docket No. 32248, *Hanson Natural Resources Company – Non-Common Carrier Status – Petition for a Declaratory Order*, I.C.C. Served Dec. 5, 1994 ("*Hanson*").

In *New York Central*, the plaintiff sought to enjoin the defendant railroad from operating over private mine trackage, owned by Peabody Coal Company, which connected Peabody's mine to defendant's common carrier line, without first obtaining authorization from the ICC. Plaintiff relied on

Texas & Pac. Ry. v. Gulf, Colo. & Santa Fe Ry., 270 U.S. 266 (1926) to support its position that defendant's operation over the track to the mine was an extension of defendant's line that required Commission authorization. The defendant railroad argued that "it operates on the Peabody track to serve only the Peabody mine, that it has no right to serve anyone else, and that it does not hold itself out by tariff or otherwise to serve the general public over this track." *New York Central*, 266 F. Supp. at 466. The court concluded that authorization from the ICC was not needed to operate over the private track to serve the track owner.

> [A] carrier need not apply for Commission certification ... for operating over private track to serve the track owner, where the carrier does not engage in common carrier service over the track and where the carrier does not use it[s] funds to maintain the track....
>
> ....
>
> ...Unless the carrier operating over private track to serve the track owner serves the public over the track or makes some investment of its resources in the track, it is difficult to understand how the carrier could, thereby, 'undertake the extension of its line of railroad, or acquire or operate any line of railroad, or extension thereof, or engage in transportation under this chapter over or by means of such additional or extended line of railroad.'

New York Central, 226 F. Supp. at 473.

Almost twenty years later, the Board relied on *New York*

Central when it decided *Hanson*.[9] In *Hanson*, the ICC discussed in detail the subject of private rail track versus common carrier railroad lines, and found, in circumstances quite similar to those here (40 miles of private track over which the owner's coal was moved by a common carrier railroad from its mine to a point of connection with the common carrier railroad's lines), that the involved track was private track not subject to the agency's jurisdiction.[10] In so holding, the Board stated,

> A railroad is a common carrier if it purports to hold itself out as a common carrier for hire and if there is an ostensible and actual movement of traffic for the public for hire. The principal test is whether there is a bona fide holding out with the ability to carry for hire.

Hanson at 14. *See also* Finance Docket No. 32077, *Northern Plains Railroad Company – Construction and Operation Exemption – Musselshell and Yellowstone Counties, MT*, I.C.C. Served Dec. 28, 1992, (private railroad would not become a common carrier subject to the ICC's jurisdiction as long as it, or a third party under contract to it, carries only its corporate affiliate's property over its track between a coal mine and a connection with a common carrier); Finance

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[9] The Board noted that "[f]ew cases have involved a private line..." and that "[t]he best case that we have found that turns upon, and explains, operations by a common carrier railroad over a "private" line is [*New York Central*]." *Hanson*, at 23.

[10] The Board distinguished private lines which are not subject to section 10901(a) and section 10903(a) in the first instance, from an exempt spur under section 10907(b)(1) [now section 10906]. "[I]t should be noted ... that a private line, although it may be called a spur is not a section 10907(b)(1) [now section 10906] spur, because it is not, in the first place, a section 10901(a) railroad line." *Hanson*, at 21, n.12.

Docket No. 31916, *Boeing Company – Acquisition and Operation Exemption – Chehalis Western Railway Company*, I.C.C. Served Oct. 24, 1991, (shipper would not become a common carrier by railroad if it carried only its own property by rail between its plant and the point of connection with a common carrier's mainline.)

Thus, the first step in determining whether the STB has jurisdiction over a particular line of track is to determine whether the track is controlled by a common carrier. As discussed earlier, the Board has no jurisdiction over activities or operations by parties that do not hold themselves out to provide transportation service to the public. Neither the general licensing provision of 49 U.S.C. § 10901 (for the construction and operation of rail lines) nor the exception to that licensing requirement contained in 49 U.S.C. § 10906 (2002) (for auxiliary track) can have any application to tracks and operations that do not involve common carriage.

The facts in this case are clear and were recited by the STB in its October 1, 2001 decision in this matter:

> PSO submitted a verified statement stating that it had paid all of the construction cost of the track and owns it. It also asserts that it has not been, and has no intention of becoming, a common carrier, and it has not held out to, or granted BNSF rights to, provide service over the line to any other shipper. V.S. Cox at 4-5. Moreover, under the *New York Central* analysis, PSO states that BNSF does not own the line in fee or through an easement, does not spend its funds to maintain the line, and serves only PSO, which is the only shipper able to receive shipments on the line.

Finance Docket No. 34013, *B. Willis, C.P.A., Inc. – Petition*

for Declaratory Order, S.T.B. Served Oct. 3, 2001, at 3. Based on these facts, the Board's conclusion that neither the construction of this trackage, nor BNSF's operation over the trackage to serve the Northeast Station was subject to the Board's jurisdiction, was clearly correct.

Willis argues in its Petition that the issues at stake in this proceeding are important because many private tracks have been constructed in recent years. Although Willis exaggerates the number of private tracks constructed by electric utilities,[11] PSO strongly agrees that it is very important that the well-recognized legal status of private trackage as articulated in *New York Central*, *Hanson* and other precedents, not be disrupted. When an entity other than a common carrier railroad decides to build a line of rail, the status of that line, as private track or common carrier facility is a choice that is made based on circumstances unique to that situation.

While some companies choose to build private track, as PSO did here, others choose to offer service to other shippers who are either located on the line or might locate there in the future. Those that have chosen to assume this common carrier obligation have requested the necessary authorization. The actual number of potential shippers along the line is irrelevant to the status of the track and the jurisdiction of the STB.

There are various reasons why a shipper might choose to

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[11] Before the STB, PSO submitted evidence of four other private tracks that had been constructed by electric utilities to access rail competition, none of which had involved ICC or STB authorization for their construction or operation. (Verified Statement of Thomas D. Crowley at 2-3 (April 4, 2001).)

construct and operate track that is built to connect with the main line of the serving carrier as a common carrier facility rather than a private facility. For example, it might wish to take advantage of the revenue that might be generated from other shippers to reduce its own costs for use of the track. Another reason a shipper might choose to build a common carrier line is to obtain the benefit of § 10901(d)—available only to a common carrier that has been licensed by the Board to construct a rail line—to cross the line of an unwilling common carrier and to have the Board set the compensation if the parties cannot agree. In other circumstances, a shipper might choose to build a private track to avoid the expense and delay associated with the regulatory process.

Here, PSO chose to build and maintain a line of private track. The track was built and is maintained by PSO at its own expense to serve only its own traffic. PSO has never offered to make service available over the track to any other shipper. BNSF has no ownership interest in the line. It does not pay to operate over the line. It does not pay to maintain the line. The operations that BNSF conducts over the track are solely on PSO's behalf, and in fact, BNSF has no right to offer to provide service to any other shipper. (*See* PSO's Reply to Petition for Declaratory Order at 5.)

II. THE PREEMPTION PROVISION OF ICCTA DID NOT EXTEND THE STB'S JURISDICTION TO PRIVATE LINES

In his Petition for Certiorari ("Willis Pet."), Willis relies upon 49 U.S.C. § 10501(b), and cases interpreting and applying it, to argue that the STB has had exclusive jurisdiction over construction and operation of all rail trackage, including private track, since enactment of the ICC

Termination Act ("ICCTA")[12]. Willis Pet. at 8. He argues that *Hanson*, and implicitly *New York Central* and other prior law, was intentionally reversed by Congress in section 10501(b)(2) of the ICCTA. Willis Pet. at 13. This argument is not only erroneous, it runs directly counter to, yet, incredibly, fails even to mention the express legislative intent of the ICCTA.

Willis fails to distinguish the preemptive effect of 49 U.S.C. § 10501(b) from the general grant of jurisdiction contained in § 10501(a). Preemption only comes into play when some area of federal law expressly or implicitly regulates the field. Willis's reliance on preemption cases is thus misplaced. The question at hand is whether the STB has jurisdiction over private track, not whether federal law preempts state law. The STB's jurisdiction is set forth in 49 U.S.C. § 10501(a), not § 10501(b). In *CSX Transportation, Inc., v. Georgia Public Service Comm.*, 944 F. Supp. 1573 (N.D. Ga. 1996), a case prominently relied upon by Willis, plaintiff CSX Transportation was indisputably a common carrier and thus subject to the jurisdiction of the STB under 49 U.S.C. § 10501(a). The question for the court was whether state regulation of a particular area of CSX's activities, such as a customer service center, was allowed or whether § 10501(b) preempted state regulation.[13] The situation is very different here. PSO is not a rail carrier under

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[12] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, Congress revised the Interstate Commerce Act, abolished the ICC (which had previously administered that Act), and transferred the remaining rail regulatory responsibilities to the Board, effective January 1, 1996.

[13] The same was true in *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997), another case relied upon by Willis in his Petition.

§ 10501(a), and the rail trackage at issue is not a common carrier facility, and thus the jurisdiction of the Board does not attach. Without jurisdiction in the first instance, the analysis should never reach subsection (b) pre-emption issues.

Willis completely ignores legislative history of which he is well aware when he relies upon the ICCTA in support of his claims that the Board has jurisdiction over the construction of rail trackage such as PSO's. While the ICCTA updated the language of § 10901(a) in several respects, it did not alter its pre-existing limitation to the construction, acquisition, or operation of a common carrier "railroad line." Moreover, the legislative history of the ICCTA explicitly confirms that Congress intended § 10901 to remain inapplicable to construction of tracks by non-railroads to serve their own facilities. *See* H.Rep. 104-422, *Conference Report on the ICC Termination Act of 1995* (Dec. 18, 1995), at 179:

> [T]he Conference intends no change in existing law with respect to the coverage of regulatory authority over construction of rail lines. Specifically, non-railroad companies who construct rail lines to serve their own facilities, whether or not such lines would be classified as a spur or other auxiliary track exempt from agency jurisdiction, are not required to obtain agency approval to engage in such construction.

The legislature has made clear that in relation to rail transportation, jurisdiction is vested in the STB only when a common carrier is involved (49 U.S.C. § 10501(a)). A common carrier must obtain a license to construct new track (49 U.S.C. § 10901) unless that track falls under an exception (49 U.S.C. § 10906) in which case the Board has jurisdiction, but no license is required. In these situations the Board's

jurisdiction is complete and preempts state regulation. When the owner of the track is not a common carrier but instead a non-railroad or private entity that does not hold out to provide common carrier service to the public, the Board does not have jurisdiction and therefore no license is required. PSO clearly falls into this latter category and therefore was not required to obtain a license from the Board.

As the foregoing discussion makes clear, the ICCTA clearly did not extend the Board's jurisdiction to private tracks. In fact, the legislative history specifically dismisses any such intent.

III. THE APPELLATE COURT'S DECISION DOES NOT SUFFER FROM ANY PROCEDURAL ERRORS

Willis argues that the Supreme Court should accept certiorari because the court of appeals based its decision on an argument that was only addressed during oral argument and that the court's decision made a significant departure from precedent. Willis is wrong on both counts.

The court of appeals remarked in its opinion that the Board's argument explaining 49 U.S.C. § 10501 was "made explicitly only at oral argument." Willis relies on this language in his Petition for Certiorari to warrant citing a string of authorities for the proposition that arguments presented to the court of appeals for the first time at oral argument are waived. *Comsat Corp. v. F.C.C.*, 250 F.3d 931, 936 n.5 (5th Cir. 2001). Willis's arguments are misplaced for a number of reasons.

The issue of jurisdiction was raised and discussed during briefing. The Government's brief made it clear that the Board's general jurisdiction over rail transportation is set

forth in 49 U.S.C. § 10501(a). *See* Joint Brief of Respondents at 4, 15. It is illogical to suggest that the Board was required to explain that 49 U.S.C. § 10501(b) does not grant the Board further jurisdiction, but rather renders the jurisdiction granted in 49 U.S.C. § 10501(a) exclusive. Nevertheless, the Board did specifically point out in its brief that Willis was focused on the wrong subsection of § 10501: "Willis in its brief quotes 49 U.S.C. 10501(b) and 10901(a) ... but fails to make any mention of section 10501(a), the Board's general grant of jurisdiction over transportation by rail carriers, and wholly ignores the limiting definition of 'rail carrier' in 49 U.S.C. 10102(5)," Joint Brief of Respondents at 16 n.15. It is evident that Willis was provided adequate notice of the distinction between 49 U.S.C. § 10501 subsection (a) and subsection (b).

One of the primary purposes of oral argument is to clarify for the court arguments made on brief. In fact, D.C. Circuit Rule 34(a) states that "Oral argument should undertake to emphasize and *clarify* the written argument appearing in the briefs...." (Emphasis added). While it may not be appropriate to raise for the first time during oral argument issues which should have been briefed, oral argument would serve little purpose if a party could not clarify a point for the court which was otherwise addressed. A court of appeals does "not normally pass upon claims that a party fails to articulate intelligibly," *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994), *reh'g and suggestion for reh'g denied, cert. denied*, 514 U.S. 1004 (1995). The Board's articulation of its interpretation of the statute as prompted by the court's questioning constituted a clarification of an existing issue, not, as Willis claims, a brand new issue.

Likewise, the court of appeals did not depart from precedent in deciding that the Board does not have

jurisdiction over private trackage. In its order, the court explicitly followed *Hanson* which held that private track is not subject to the Board's jurisdiction. The three cases cited by Willis in his Petition on page 24 in support of his theory that the appellate court departed from prior law are inapposite to the case at hand – all involved common carrier facilities clearly subject to the STB's jurisdiction under 49 U.S.C. § 10501(a).[14] In short, Willis's interpretation of 49 U.S.C. § 10501 is incorrect and the court of appeals properly affirmed the STB's conclusion that jurisdiction was lacking.

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[14] Finance Docket No. 33466, *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp.*, S.T.B. Served February 27, 2001 (involving common carrier railroad's construction and operation of facilities); Finance Docket No. 33971, *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, Ma.*, S.T.B. Served May 1, 2001 (dealing with the broad scope of federal preemption); and Finance Docket No. 34020, *Fletcher Granite Company, LLC – Petition for Declaratory Order*, S.T.B. Served June 29, 2001 (addressing 49 U.S.C. §§ 10901(a) and 10906 and the scope of federal preemption).

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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SERVICE DATE - JULY 26, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34013

B. WILLIS, C.P.A., INC. —
PETITION FOR DECLARATORY ORDER

Decided: July 23, 2002

This decision addresses the petition of B. Willis, C.P.A., Inc. (B. Willis or Petitioner), filed June 21, 2002, to reopen the decision served October 3, 2001 in this proceeding.[1] Petitioner states that its request is based on new evidence that demands a different result. However, the evidence Petitioner brings is not new evidence that was previously unavailable to it, nor does that evidence lead us to any different conclusion. Accordingly, Petitioner's request to reopen this administratively final decision will be denied.

BACKGROUND

1. Board Licensing in General. Before a person may construct or operate a new or extended rail line, it generally must obtain authorization from the Board. 49 U.S.C. 10901. There are, however, exceptions. Under 49 U.S.C. 10906, no Board authorization is required for construction or operation

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[1] That decision was issued by the Director of the Office of Proceedings, to whom responsibility for deciding whether to institute a declaratory order proceeding has been delegated. 49 CFR 1011.8(c)(6).

of spur, industrial, team, switching, or side tracks (so-called "auxiliary tracks").[2] And, as discussed below and in our October 2001 decision, the Board has no jurisdiction over private track — track that is used exclusively by the track's owner for movement of its own goods (either by utilizing its own equipment or by contracting for service) and for which there is no common carrier obligation to serve other shippers that might locate along the line.

2. This Case. In February 2001, B. Willis filed a petition seeking a Board declaration that the Public Service Company of Oklahoma d/b/a American Electric Power Company (PSO) was required to obtain prior authorization from our predecessor, the Interstate Commerce Commission (ICC),[3] to construct and operate approximately 10 miles of rail track in Oklahoma that was built in 1994-95. That track connects PSO's Northeastern Generating Station, an electric power generating facility located at Oologah, Oklahoma (the power plant), with the main line of The Burlington Northern and Santa Fe Railway Company (BNSF). Prior to construction of the new track, the power plant could receive rail service at the power plant only from the Union Pacific Railroad Company (UP).

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[2] The Board has jurisdiction over auxiliary tracks, which are part of the common carrier (i.e., regulated) rail network, but a Board license is not required to construct or operate them because of the 10906 exception. Thus, track classified as spur, industrial or side track has a regulatory status that private track does not share. See United Transp. Union v. STB, 183 F.3d 606, 612 (7th Cir. 1999).

[3] In the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress abolished the ICC, revised the Interstate Commerce Act, and transferred remaining rail regulatory responsibilities to the Board, effective January 1, 1996.

PSO had the track constructed for the sole purpose of providing the power plant with access to a second rail carrier. The rail track was constructed at PSO's expense, and PSO owns the track and pays the costs associated with its maintenance. Rail operations over the track, supplying trainloads of coal to the power plant, commenced in March 1995. The rail operations are conducted by BNSF under contract with PSO. BNSF uses the track pursuant to a license from PSO.

There are no other shippers located on the line, and neither PSO nor BNSF holds out the possibility for any other shipper(s) to obtain service over the line. To the contrary, BNSF's contractual agreement with PSO for use of the track does not permit service to any entity other than PSO's power plant, either now or in the future. Based on these facts that were on the record before us, our October 2001 decision determined that the track is private track, which falls outside the reach of the Board's statutory jurisdiction, and that prior agency authorization or approval was not required for its construction or operation.

Part of the track was built across a parcel of land owned by B. Willis. PSO exercised its power of eminent domain as an electric generating company pursuant to Oklahoma state law after it failed to reach agreement with B. Willis to purchase a right-of-way easement across a corner of B. Willis' property.[4] B. Willis continues to object to the taking and has sought judicial review of our October 2001 decision in the United States Court of Appeals for the District of

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[4] The condemnation action was filed by PSO in October 1992. PSO took possession of the easement in March 1994 and thereafter had the track constructed.

Columbia Circuit.[5]

On June 21, 2002 — shortly before its opening brief was due to be filed in court — B. Willis filed a petition to reopen this administratively final action pursuant to 49 CFR 1115.4, asserting "a need to introduce new evidence that shows that there was material error in the Board's prior decision."[6] The purported new evidence consists of copies of the following documents issued between 1993 and 2000: (1) the Oklahoma Official State Railroad Map; (2) a diagram of PSO's track indicating 6 crossings of public roads; and (3) a letter from an Oklahoma Department of Transportation (ODOT) official to the Federal Railroad Administration (FRA) reporting the assignment of 12 crossing inventory numbers[7] related to PSO's track.

On June 27, 2002, PSO and BNSF filed a joint reply. They oppose reopening, on the grounds that the proffered evidence is not new; that B. Willis has not explained why this evidence was not submitted to the Board previously; that the evidence is merely cumulative; and that it would not affect the outcome. PSO and BNSF emphasize that the petition to reopen simply reiterates arguments B. Willis had already

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5 B. Willis, C.P.A., Inc. v. STB and USA, No. 01-1441 (D.C. Cir. filed Oct. 9, 2001).

6 Petition to reopen at 1.

7 The National Highway-Rail Crossing Inventory is maintained by the United States Department of Transportation (U.S. DOT) with the cooperation of state departments of transportation and the Association of American Railroads (AAR). The national crossing inventory consists of a uniform national numbering system in which a unique designation, consisting of a 6-digit number followed by a letter, is assigned to every highway-rail crossing in the nation.

made.

DISCUSSION AND CONCLUSION

Under our Rules of Practice, a petitioner seeking to reopen an administratively final decision must "state in detail the respects in which the proceeding involves material error, new evidence, or substantially changed circumstances." 49 CFR 1115.4. Where new evidence is involved, that evidence "must not appear to be cumulative, and an explanation must be given why it was not previously adduced." 49 CFR 1115.3(c). B. Willis has not satisfied these criteria.

The limitations in our rules against the introduction of new evidence reflect the need for finality in the administrative process. A party should not withhold evidence it considers to be relevant until after it has obtained a result not to its liking, and then seek to have the proceeding reopened so that it may introduce that evidence.[8] The evidence B. Willis now seeks to introduce was all clearly available at the time it filed its petition at the Board in February 2001. The Oklahoma Official State Railroad Map has been available since 2000; the diagram of PSO's track apparently dates from 1993;[9] and the ODOT letter to FRA

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[8] See, e.g., S.R. Investors, Ltd., Doing Business as Sierra Railroad Company — Abandonment — In Tuolumne County, CA, Docket No. AB-239X (I.C.C. Served Jan. 26, 1988), slip op. at 7, aff'd sub nom. Friends of Sierra R.R., Inc. v. ICC, 881 F.2d 663 (9th Cir. 1989).

[9] See PSO/BNSF joint reply at page 3, note 1: "The date on [the track diagram] is illegible, however, it is believed that it was created in 1993."

dates from August 1995.[10] B. Willis asserts that it did not submit these materials earlier because it could not have known that PSO would claim not to be a common carrier (or that the Board would agree). As PSO has asserted its noncarrier status for years, B. Willis' claim is not credible. In short, Petitioner has not satisfactorily explained why it did not submit this evidence until now.

In any event, the newly proffered evidence does not in any way undermine the October 2001 decision. While PSO's track is shown on the Oklahoma Official State Railroad Map, the State of Oklahoma issues its railroad maps solely for informational purposes. Inclusion of a particular piece of track on the Oklahoma Official State Railroad Map indicates the track's existence and location within Oklahoma's borders, but does not convey any judgment as to whether particular track is for common carrier freight service or not, and thus is not determinative of whether that track is subject to our jurisdiction under the revised Interstate Commerce Act (ICA), at 49 U.S.C. Subtitle IV. PSO and BNSF attached to their joint reply a copy of an April 2001 letter from Mr. John E. Dougherty, Branch Manager of the Rail Programs Division of ODOT, to an attorney representing PSO, who had inquired regarding what tracks are included on the Oklahoma Official State Railroad Map.[11] The ODOT official explained: "On our map, we include trackage to power stations, such as Public Service Company of Oklahoma and Western Farmers

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[10] B. Willis also attached as an exhibit a copy of a 1992 letter from a PSO employee (written long before the track was constructed) that B. Willis construes as an admission by PSO that it is a common carrier. But that letter — which provides no basis on which to conclude that PSO holds out freight service to the general public — had already been submitted to the Board earlier in this proceeding.

[11] PSO/BNSF joint reply, Exhibit 4.

Electric Co-op. These two track designations were just recently added to our 1998 and 2000 maps to identify location only." Another letter from ODOT's Mr. Dougherty further explains: "ODOT does not have statutory authority to regulate railroad companies or their operations. ODOT also does not make any determination as to rail operators' status as common carriers or actual ownership."[12] Thus, inclusion of track on the Oklahoma map does not reflect any opinion on the part of ODOT as to common carrier status.[13]

Similarly, the diagram of PSO's track, indicating that it crosses several roads, is not relevant to our determination that this track is private track. Any track approximately 10 miles in length is bound to cross a few public roads or highways, even in a remote rural area such as this. Crossing public roads where necessary does not turn otherwise private track into a regulated rail line. B. Willis' petition to reopen cites various authority for the proposition that common carrier railroads are allowed to cross state roads, and asserts that this somehow proves that private rail track cannot do so.[14] But that conclusion — which assumes the point it is attempting to prove — is neither logical nor correct. There are many situations in which private track crosses public highways, and the mere existence of such crossings does not provide a basis for bringing such track under our regulatory jurisdiction.

Finally, the 1995 ODOT letter to FRA, indicating that

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[12] Id., Exhibit 5.

[13] Indeed, the highlights of the text accompanying the Oklahoma rail map focus not on rail freight service, but on the resumption of Amtrak passenger service in Oklahoma in 1999 after an absence of nearly 20 years.

[14] Petition to reopen at 7-8.

PSO's crossings are included in the national highway-rail grade crossing inventory, is likewise not indicative of common carrier status. That national inventory assigns to every U.S. highway-rail grade crossing a unique numeric identifier, so that data about all crossing incidents and accidents in the country — not just those involving common carrier railroads — can be accurately collected, tabulated and analyzed. The U.S. DOT utilizes broad definitions to specify which crossings should obtain crossing inventory numbers and report accidents and incidents at those crossings to the FRA. "*Highway-rail grade crossing* means a location where a public highway, road, street, or private roadway, including associated sidewalks and pathways, crosses one or more railroad tracks at grade." 49 CFR 225.5. "*Railroad transportation* means any form of non-highway ground transportation that runs on rails or electro-magnetic guideways, including commuter or other short-haul railroad passenger service in a metropolitan or suburban area. . . without regard to whether they use new technologies not associated with traditional railroads." Id. These broad definitions capture all crossings of roads or highways by tracks of any kind, whether tracks of a common carrier freight railroad, tracks of a passenger or commuter operation, or private rail tracks. Assignment of crossing inventory identifier numbers is thus simply not relevant to our determination under the ICA of whether or not track constitutes a common carriage rail line.

On the basis of the purportedly new evidence, B. Willis reiterates arguments already made on the record and already considered in reaching the October 2001 decision. But these arguments are no more persuasive than they were when first presented. A person is not a rail carrier for purposes of the ICA unless it holds itself out to provide rail service to others. See 49 U.S.C. 10102(5) ("'rail carrier' means a person

providing common carrier railroad transportation for compensation"); 49 U.S.C. 10501(a)(1) ("the Board has jurisdiction over transportation by rail carrier").[15] Thus, as the October 2001 decision correctly concluded (at 4), where, as here, "a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires ICC or Board authorization or approval."

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The petition to reopen is denied.

2. This action is effective on its date of service.

By the Board, Chairman Morgan and Vice Chairman Burkes.

Vernon A. Williams
Secretary

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[15] B. Willis seeks a broader reading of our jurisdiction based upon the language of 49 U.S.C. 10102(6) ("'railroad' includes. . . the road used by a rail carrier and owned by it or operated under an agreement"), but that section must be read in conjunction with sections 10102(5) and 10501(a)(1).

49 U.S.C. §10102(2002)
§ 10102. Definitions

In this part--
(1) "Board" means the Surface Transportation Board;
(2) "car service" includes (A) the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, other vehicles, and special types of equipment used in the transportation of property by a rail carrier, and (B) the supply of trains by a rail carrier;
(3) "control", when referring to a relationship between persons, includes actual control, legal control, and the power to exercise control, through or by (A) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (B) any other means;
(4) "person", in addition to its meaning under section 1 of title 1, includes a trustee, receiver, assignee, or personal representative of a person;
(5) "rail carrier" means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation;
(6) "railroad" includes--
(A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
(B) the road used by a rail carrier and owned by it or operated under an agreement; and
(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation;
(7) "rate" means a rate or charge for transportation;
(8) "State" means a State of the United States and the District of Columbia;
(9) "transportation" includes--
(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier,

dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property; and

(10) "United States" means the States of the United States and the District of Columbia.

49 U.S.C. §10501(2002)
§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is--
(A) only by railroad; or
(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.
(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--
(A) a State and a place in the same or another State as part of the interstate rail network;
(B) a State and a place in a territory or possession of the United States;
(C) a territory or possession of the United States and a place in another such territory or possession;
(D) a territory or possession of the United States and another place in the same territory or possession;
(E) the United States and another place in the United States through a foreign country; or
(F) the United States and a place in a foreign country.
(b) The jurisdiction of the Board over--
(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies

provided under Federal or State law.

(c)(1) In this subsection--

(A) the term "local governmental authority"--

(i) has the same meaning given that term by section 5302(a) of this title; and

(ii) includes a person or entity that contracts with the local governmental authority to provide transportation services; and

(B) the term "mass transportation" means transportation services described in section 5302(a) of this title that are provided by rail.

(2) Except as provided in paragraph (3), the Board does not have jurisdiction under this part over mass transportation provided by a local governmental authority.

(3)(A) Notwithstanding paragraph (2) of this subsection, a local governmental authority, described in paragraph (2), is subject to applicable laws of the United States related to--

(i) safety;

(ii) the representation of employees for collective bargaining; and

(iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers.

(B) The Board has jurisdiction under sections 11102 and 11103 of this title over transportation provided by a local governmental authority only if the Board finds that such governmental authority meets all of the standards and requirements for being a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission that were in effect immediately before January 1, 1996. The enactment of the ICC Termination Act of 1995 shall neither expand nor contract coverage of employees and employers by the Railway Labor Act, the Railroad Retirement Act of 1974, the Railroad Retirement Tax Act, and the Railroad Unemployment Insurance Act.

49 U.S.C. §10901(2002)

§ 10901. Authorizing construction and operation of railroad lines

(a) A person may--
(1) construct an extension to any of its railroad lines;
(2) construct an additional railroad line;
(3) provide transportation over, or by means of, an extended or additional railroad line; or
(4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c).
(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Board shall give reasonable public notice, including notice to the Governor of any affected State, of the beginning of such proceeding.
(c) The Board shall issue a certificate authorizing activities for which such authority is requested in an application filed under subsection (b) unless the Board finds that such activities are inconsistent with the public convenience and necessity. Such certificate may approve the application as-filed, or with modifications, and may require compliance with conditions (other than labor protection conditions) the Board finds necessary in the public interest.
(d)(1) When a certificate has been issued by the Board under this section authorizing the construction or extension of a railroad line, no other rail carrier may block any construction or extension authorized by such certificate by refusing to permit the carrier to cross its property if--
(A) the construction does not unreasonably interfere with the operation of the crossed line;
(B) the operation does not materially interfere with the operation of the crossed line; and

(C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the parties are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Board for determination. The Board shall make a determination under this paragraph within 120 days after the dispute is submitted for determination.

49 U.S.C. §10906

§ 10906. Exception

Notwithstanding section 10901 and subchapter II of chapter 113 of this title, and without the approval of the Board, a rail carrier providing transportation subject to the jurisdiction of the Board under this part may enter into arrangements for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. The Board does not have authority under this chapter over construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks.

D.C. Circuit Rule 34
Rule 34. Oral Argument

(a) Substance and Style of Oral Argument. Oral argument should undertake to emphasize and clarify the written argument appearing in the briefs. This court will not entertain any oral argument that is read from a prepared text.
(b) Time Allowed for Argument. Counsel will be afforded such time for oral argument as the court may provide and will be so advised by order. Requests for enlargement of time may be made by motion filed reasonably in advance of the date fixed for the argument.
(c) Notice by Counsel. No less than 5 days before the date of scheduled argument, the court must be notified of the names of counsel who will argue. Not more than 2 counsel may be heard for each side except by leave of the court, granted on motion for good cause shown. Such requests are not favored. In cases in which 15 minutes or less per side is allotted for argument, only one counsel may be heard for each side except by leave of the court, granted on motion for good cause shown.
(d) Apportionment of Time Among Parties. In the absence of an order of this court, and subject to the provision as to number of counsel stated in paragraph (c), counsel for the parties on each side of a case, including counsel for any intervenor, may agree on the apportionment of the time allotted. In the event of a failure to agree, the court will allocate the time upon motion duly filed and served. Unless otherwise ordered, counsel for an intervenor will be permitted to argue only to the extent that counsel for the party whose side the intervenor supports is willing to share allotted time.
(e) Participation in Oral Argument by Amici Curiae. An amicus curiae, other than one appointed by the court, will not be permitted to participate in the oral argument without leave of the court granted for extraordinary reasons on motion,

except that counsel for the party supported by amicus curiae may consent to such participation subject to the provision as to number of counsel stated in paragraph (c) above. A motion by amicus curiae seeking leave to participate in oral argument must be filed at least 14 days prior to the date oral argument is scheduled.

(f) Failure to File Brief. A party who fails to file a brief will not be heard at the time of oral argument except by permission of the court.

(g) Continuance of Oral Argument. When a case has been set for oral argument, it may not be continued by stipulation of the parties, but only by order of the court upon a motion evidencing extraordinary cause for a continuance.

(h) Consolidation. Where 2 or more cases are consolidated under FRAP 3(b) or for other reason by this court, the consolidated cases will be considered as one case for the purpose of this rule unless the court directs otherwise.

(i) Exhibits and Handouts. If counsel intends to use exhibits during argument or to hand out prepared materials, notice of this intent must be provided to the court and all other counsel presenting argument by letter received not less than 5 days before the date of the argument. The letter must set forth justification for the use of the exhibits or handouts.

(j) Disposition Without Oral Argument.

(1) Procedure. Whenever the court, on its own motion, or on the motion of a party or stipulation of the parties, concludes that oral argument is not needed, the court may, after causing notice of that determination to be given to the parties by the clerk, proceed to dispose of the case without oral argument.

(2) Reconsideration. Motions for reconsideration of a decision to dispose of a case without oral argument may be made within 10 calendar days of the date of the order advising counsel of this court's determination that the case is to be decided without oral argument. Such motions are disfavored.

Okla. Stat. Ann. tit. 66 §53 (West 2003)
§ 53. Taking by eminent domain--Commissioners--Appointment and proceedings-- Right to construct road

A. If the owner of any real property or interest therein, over which any railroad corporation, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.
B. The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish legal notices in the county where the petition is filed, the ten-day period to begin with the first publication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

C. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded, without further acknowledgment or proof, in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

D. "Just compensation", as used in subsection C of this section, shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. If only a part of a tract is taken, just compensation shall be ascertained by determining the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that portion left remaining immediately after the taking.

(3)

Supreme Court, U.S.
FILED
JUN 12 2003
OFFICE OF THE CLERK

No. 02-1498

In the Supreme Court of the United States

B. WILLIS, C.P.A., INC., PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the Surface Transportation Board has jurisdiction to regulate private rail tracks.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

American Trucking Ass'ns v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967)	4
Atchison, T. & S. Ry. v. *Kansas City Stock Yards Co.*, 33 I.C.C. 92 (1915)	4
Brotherhood of Locomotive Engr's v. *United States*, 101 F.3d 718 (D.C. Cir. 1996)	7
Chevron U.S.A. Inc. v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)	6
Hughes v. *Consol-Penn. Coal Co.*, 945 F.2d 594 (3d Cir. 1991), cert. denied, 504 U.S. 955 (1992)	7
ICC v. *Memphis Union Station Co.*, 360 F.2d 44 (6th Cir.), cert. denied, 385 U.S. 830 (1966)	7
Illinois Commerce Comm'n v. *ICC*, 879 F.2d 917 (D.C. Cir. 1989)	7
New Orleans Terminal Co. v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967)	7
Nicholson v. *ICC*, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984)	7
Railway Labor Exec. Ass'n v. *City of Galveston*, 849 F.2d 145 (5th Cir. 1988)	7
Texas & Pac. Ry. v. *Gulf, Colo. & S.F. Ry.*, 270 U.S. 266 (1926)	7
United States v. *California*, 297 U.S. 175 (1936)	4

Statutes: Page

ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 2
Interstate Commerce Act, 49 U.S.C. 10101 *et seq.*:
49 U.S.C. 10102(5) 2, 4, 7
49 U.S.C. 10501 4
49 U.S.C. 10501(a) 6
49 U.S.C. 10501(a)(1) 2
49 U.S.C. 10501(a)(2) 2
49 U.S.C. 10501(b) 2, 5, 6
49 U.S.C. 10901 3
49 U.S.C. 10901(a) 2, 7

Miscellaneous:

Borough of Riverdale—In re Declaratory Order—The N.Y. Susquehanna & W. Ry., STB Finance Docket No. 33466 (STB served Feb. 27, 2001) 6
Fletcher Granite Co.—In re Declaratory Order, STB Finance Docket No. 34020 (STB served June 29, 2001) 6
H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. (1995) 5
Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer, STB Finance Docket No. 33971 (STB served May 1, 2001) 6

In the Supreme Court of the United States

No. 02-1498

B. WILLIS, C.P.A., INC., PETITIONER

v.

SURFACE TRANSPORTATION BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is *reprinted in* 51 Fed. Appx. 321. The opinion of the Surface Transportation Board (Pet. App. 4a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2002. A petition for rehearing was denied on January 10, 2003 (Pet. App. 14a). The petition for a writ of certiorari was filed on April 10, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Interstate Commerce Act, the Surface Transportation Board (Board) has jurisdiction over "transportation by rail carrier" that is conducted over any "part of the interstate rail network." 49 U.S.C. 10501(a)(1), 10501(a)(2)(A). The term "rail carrier" is defined, in pertinent part, as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. 10102(5). Under 49 U.S.C. 10901(a), persons who are, or intend to become, rail common carriers must obtain authorization from the Board before constructing or operating a new or extended railroad line.

Before 1996, States played a limited role in regulation of intrastate rail operations. In the ICC Termination Act of 1995 (ICCTA), Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), Congress expanded the scope of federal preemption to directly preempt state regulation of all rail freight facilities and operations over which the Board has jurisdiction, even if the facilities are located in a single State. Under 49 U.S.C. 10501(b), "the jurisdiction of the Board over transportation by rail carriers," including "the construction" and "operation" of "spur" and "side tracks," is "exclusive" and "preempt[s] the remedies provided under Federal or State law."

2. The Public Service Company of Oklahoma (PSO) operates an electric power generating facility in Oologah, Oklahoma. Pet. App. 5a. At one time, the Union Pacific Railroad handled all coal deliveries to PSO. *Ibid.* In 1992, PSO filed a state law eminent domain proceeding to obtain a right-of-way across a tract of land owned by petitioner. *Ibid.* The purpose of obtaining the right-of-way was to construct railroad track that would connect PSO's electric power facility

to the main line of Burlington Northern and Santa Fe Railway Company (BNSF), enabling BNSF to deliver coal to PSO. *Ibid.*

In March 1994, PSO took possession of the right-of-way and constructed track connecting its Oologah plant to BNSF's main line. Pet. App. 5a. In March 1995, BNSF began using the track. *Ibid.* PSO constructed the track at its own expense, owns the track, and pays the cost of track maintenance. *Id.* at 8a-9a; Gov't C.A. Br. 7. BNSF conducts rail operations over the track pursuant to an agreement with PSO that does not permit service to any entity other than PSO. Pet. App. 9a; Gov't C.A. Br. 8.

3. In February 2001, six years after the track over petitioner's land was constructed, petitioner filed a petition with the Board seeking a declaration that the construction and operation of the track over petitioner's property was unlawful because it had not been approved by the Board under Section 10901. Pet. App. 4a. The Board denied the petition. *Id.* at 4a-11a. The Board reasoned that its jurisdiction extends only to track that is used for "common carrier service" and that the track over petitioner's land constituted "private track" that was not used for that purpose. *Id.* at 6a-7a. The Board held that "if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires * * * Board authorization or approval." *Id.* at 10a.

4. In an unpublished per curiam opinion, the court of appeals denied the petition for review. Pet. App. 1a-3a. The court agreed with the Board's determination that its jurisdiction extends only to track used for common

carriage and that it therefore lacks jurisdiction over private tracks. *Id.* at 2a. The court rejected as "implausible on its face" petitioner's contention "that § 10501(b)(2) confers upon the Board jurisdiction over all track, regardless whether it is used for private or common carriage." *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct. That decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 6-8) that the Board's jurisdiction extends to private operations conducted over private track. That contention is without merit. The Board "has jurisdiction over transportation by rail carrier." 49 U.S.C. 10501. The term "rail carrier" is defined, in relevant part as "a person providing *common carrier* railroad transportation for compensation." 49 U.S.C. 10102(5) (emphasis added). The Board's jurisdiction therefore extends only to track used for "common carrier" railroad transportation. Because a private operation conducted over private track is not used for "common carrier" transportation, it falls outside the Board's jurisdiction.

That conclusion follows from the plain meaning of the term "common carrier." That term derives its meaning from the common law. *American Trucking Ass'ns* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 406 (1967). Under the common law, a common carrier is an entity that holds itself out to provide service to the general public for hire. *United States* v. *California*, 297 U.S. 175, 182 (1936); *Atchison, Topeka & Santa Fe Ry.* v. *Kansas City Stock Yards Co.*, 33 I.C.C. 92, 100 (1915) ("The principal test of common carriage is whether

there is a bona fide holding out coupled with the ability to carry for hire."). Given that established common law meaning of the term "common carrier," the Board lacks jurisdiction over private rail operations conducted over private track. As the Board explained in this case, "if a shipper does not hold out to provide common carrier railroad service over a line it constructs and maintains to serve its own facility, and no other shippers are served by the line, then neither that construction, nor a railroad's operation over that track to reach the shipper's facility, requires * * * Board authorization or approval." Pet. App. 10a.

The legislative history of the ICCTA confirms that understanding. The Conference Report specifically states that "non-railroad companies who construct rail lines to serve their own facilities * * * are not required to obtain agency approval to engage in such construction." H.R. Conf. Rep. No. 422, 104th Cong., 1st Sess. 179 (1995).

Petitioner contends (Pet. 12-14) that 49 U.S.C. 10501(b) gives the Board jurisdiction over private operations conducted over private track. But that provision simply specifies that "[t]he jurisdiction of the Board over transportation by rail carriers," including the construction and operation of "spur" and "side tracks," is "exclusive" and "preempt[s] the remedies provided under Federal or State law." 49 U.S.C. 10501(b). That preemption provision does not purport to expand the Board's jurisdiction beyond that set forth in Section 10501(a). As the court of appeals concluded, petitioner's view that Section 10501(b) expands the Board's jurisdiction so as to encompass track that is not used for common carriage "is implausible on its face." Pet. App. 2a. At the very least, the Board's interpretation of the extent of its regulatory authority is rea-

sonable and is therefore entitled to controlling weight. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-844 (1984).

2. Petitioner asserts (Pet. 14-19) that the Board did not provide an explanation of the basis for its decision until oral argument in the court of appeals. But the Board's decision makes clear why the Board reached the conclusion that it did. In its decision, the Board explained that Section 10501(a) provides the exclusive source of its jurisdiction and that its jurisdiction is therefore confined to track used for common carriage. Pet. App. 6a-7a. The Board reiterated that position in its brief in the court of appeals. Gov't C.A. Br. 15-16. That brief also stated that, while petitioner had relied on the preemptive force of Section 10501(b), petitioner failed "to make any mention of section 10501(a)" and "wholly ignore[d] the limiting definition of 'rail carrier' in 49 U.S.C. 10102(5)." *Id.* at 16 n.15. Petitioner therefore had an ample opportunity to address the basis for the Board's decision before the court of appeals issued its decision in this case.

Petitioner contends (Pet. 24) that the Board has held in other cases that it has jurisdiction over private track that is not used for common carriage. In fact, however, all of the cases cited by petitioner address the preemptive effect of the Board's regulation of *common carrier* track.[1] None of those cases suggests that the

---

[1] See *Fletcher Granite Co.—In re Declaratory Order*, STB Finance Docket No. 34020 (STB served June 29, 2001); *Joint Petition for Declaratory Order—Boston & Maine Corp. & Town of Ayer*, STB Finance Docket No. 33971 (STB served May 1, 2001); *Borough of Riverdale—In re Declaratory Order—The N.Y. Susquehanna & W. Ry.*, STB Finance Docket No. 33466 (STB served Feb. 27, 2001).

Board has jurisdiction over private track that is not used for common carriage.

3. Finally, petitioner contends (Pet. 25-29) that the Board's decision conflicts with decisions addressing the distinction between the construction and operation of "main line" track, which requires authorization under 49 U.S.C. 10901(a), and the construction and operation of "spur" track, which is subject to the Board's jurisdiction but exempt from Section 10901(a)'s authorization requirement.[2] Under those decisions, a carrier's use of common carrier track to extend its operations into an area served by another carrier is subject to the authorization requirement. Relying on those decisions, petitioner contends that BNSF must obtain a license to operate the track over petitioner's property because BNSF extended its operations into new territory by using PSO's track.

The question presented in this case, however, is not whether the track over petitioner's property is main line or spur track. Instead, this case raises the antecedent question whether the track over petitioner's property is "common carrier" track. See 49 U.S.C. 10901(a), 10102(5). The cases cited by petitioner simply do not address that issue.

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[2] *Texas & Pacific Ry.* v. *Gulf, Colo. & Santa Fe Ry.*, 270 U.S. 266 (1926); *Brotherhood of Locomotive Eng'rs* v. *United States*, 101 F.3d 718 (D.C. Cir. 1996); *Hughes* v. *Consol-Penn. Coal Co.*, 945 F.2d 594, 612 (3d Cir. 1991), cert. denied, 504 U.S. 955 (1992); *Illinois Commerce Comm'n* v. *ICC*, 879 F.2d 917 (D.C. Cir. 1989); *Railway Labor Exec. Ass'n* v. *City of Galveston*, 849 F.2d 145 (5th Cir. 1988); *Nicholson* v. *ICC*, 711 F.2d 364 (D.C. Cir. 1983), cert. denied, 464 U.S. 1056 (1984); *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), cert. denied, 386 U.S. 942 (1967); *ICC* v. *Memphis Union Station Co.*, 360 F.2d 44 (6th Cir.), cert. denied, 385 U.S. 830 (1966).

Similarly, petitioner's claim (Pet. 28) that BNSF was the moving force behind the construction of the track over petitioner's property is beside the point. The crucial facts are that PSO paid for all the construction costs of the track, PSO owns the track, and PSO does not provide, and has not authorized BNSF to provide, service over the track to any other shipper. In these circumstances, the Board reasonably concluded that the track at issue is not used for common carriage and that it therefore falls outside the Board's jurisdiction. In any event, that fact-bound conclusion, affirmed in an unpublished decision, does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-1498

In the

Supreme Court of the United States

B. WILLIS, C.P.A., INC.,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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14 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHROITIES ii

STATEMENT 1

ARGUMENT I 1

RESPONDENTS HAVE MISCHARACTERIZED THE ISSUES ON APPEAL.

ARGUMENT II 2

THE TRACK AT ISSUE IS CONTROLLED AND USED BY A COMMON CARRIER.

ARGUMENT III 6

THE DECISION UNDER APPEAL CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE STB.

CONCLUSION 10

APPENDIX

SURFACE TRANSPORTATION BOARD DECISION (06/25/2001) 1a

TABLE OF AUTHOITIES

Cases

Brotherhood of Locomotive *Engineers v. U.S.*, 101 F.3d 718, 728 (D.C. Cir. 1996) 8

Illinois Commerce Commission v. I.C.C., 879 F.2d 917 (D.C. Cir. 1989) 6

New York Cent. Ry. Co. v. Southern Ry., 226 F.Supp. 463 (N.D. Ill. 1964) 7

STB Finance Docket No. 33971, *Borough of Riverdale-Petition for Declaratory Order-The New York Susquehanna and Western Railway Corporation*, (served February 27, 2001) 9

STB Finance Docket No. 34020, *Fletcher Granite Company, LLC- Petition for Declaratory Order* (served June 29, 2001) 8

STB Finance Docket No. 33971, *Joint Petition for Declaratory Order-Boston and Maine Corporation and Town of Ayer, Ma.*, (served May 1, 2001) 9

Texas & N.O.R. Co. v. Northside Belt Ry. Co., 276 U.S. 475, 48 S. Ct. 361 (1928) 5

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry. 270 U.S. 266, 46 Sp. Ct. 263, 70 L.Ed.578 (1926) 7

United States v. Baltimore & Ohio R. Co., 333 U.S. 169, 68 S.Ct.49 (1948) 8

Statutes

49 USC, § 10901(a)..... 3

49 U.S.C., § 10102..... 4

Regulations

49 CFR Ch X, Pt. 1150.1 4

STATEMENT

Petitioner, B. Willis, C.P.A., Inc., ("Willis") filed its Petition For Certiorari on April 10, 2003. Subsequently, Briefs in Opposition were filed by Public Service Company of Oklahoma and by the Solicitor General on behalf of Surface Transportation Board and the United States of America.

Because both of the Briefs in Opposition mischaracterize the facts and issues and, in at least one case, falsely state the facts of a prior decision of the Surface Transportation Board, STB Finance Docket No. 34020, *Fletcher Granite Company, LLC- Petition for Declaratory Order* (served June 29, 2001), Willis now files this Reply Brief.

ARGUMENT I

RESPONDENTS HAVE MISCHARACTERIZED THE ISSUES ON APPEAL.

On page 4 of the Brief in Opposition filed by the Solicitor General is the following:

> Petitioner contends (Pet 6-8) that the Board's jurisdiction extends to private operations conducted over private track.

On page 6 of the Brief in Opposition filed by Public Service Company of Oklahoma ("PSO") is the following:

> The issue at hand is whether the track that PSO built for itself to handle only its own coal trains is subject to the Board's jurisdiction.

Both of these assertions completely mischaracterize the issues before the Court and Willis' contentions concerning those issues.

PSO did **NOT** build the track for itself to handle its own coal trains. In fact, **PSO does not have any coal trains**. It is the **Burlington Northern and Santa Fe Railway Company ("BNSF"),** a common carrier railroad, which has coal trains and the track was built for BNSF, not PSO. What PSO has is **coal,** which it **bails to BNSF** in Wyoming. BNSF then transports the coal over hundreds, if not thousands, of miles of BNSF's mainline common carrier track in a continuous, through journey in interstate commerce before **BNSF's trains** travel over the track at issue and then onto the grounds of PSO's generating station in Oologah, Oklahoma, where the bailment terminates. The track was built for BNSF, not PSO, so BNSF could divert millions of dollars in annual revenues to itself from a rival common carrier, Union Pacific.

The operations that Petitioner contends are subject to the Board's jurisdiction are not "private operations conducted over private track" but rather interstate commerce operations from Wyoming to Oologah, Oklahoma, only a small portion of which occurs over the track at issue, the right of way for which PSO is still seeking over Petitioner's property under Oklahoma's railroad eminent domain statutes as a public, not private, necessity.

II.

THE TRACK AT ISSUE IS CONTROLLED AND USED BY A COMMON CARRIER.

On page 2 of the Brief in Opposition filed by the Solicitor General is the following:

> Under the Interstate Commerce Act, the Surface Transportation Board (Board) has jurisdiction over "transportation by rail carrier" that is conducted over any "part of the interstate rail network."

On pages 10 and 14 of PSO's Brief in Opposition is the following:

> Thus, the first step in determining whether the STB has jurisdiction over a particular line of track is to determine whether the track is controlled by a common carrier...The legislature has made clear that in relation to rail transportation, jurisdiction is vested in the STB only when a common carrier is involved (49 U.S.C. § 10501(a)).

In fact, the STB's jurisdiction is not restricted to track that is owned or controlled by a common carrier. 49 USC, § 10901(a) reads as follows:

> A **person** may-
>
> (1) construct an extension to any of its railroad lines;
>
> (2) **construct an additional railroad line**;
>
> (3) **provide transportation over, or by means of, an extended or additional railroad line: or**
>
> (4) **in the case of a person other than a rail carrier**, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c). (Emphasis added.)

The relevant portions of the Code of Federal Regulations (49 CFR Ch X, Pt. 1150) read in part:

§1150.1 Introduction

(a) When an application is required.

> This subpart governs applications under 49 U.S.C. 10901 for a certificate of public convenience and necessity authorizing the construction, acquisition or operation of railroad lines. **Noncarriers require Board approval** under section 10901 to construct, acquire or operate a rail line **in interstate commerce.** (Emphasis added.)

However, even if the Respondents are correct in their characterization of the STB's jurisdiction, the track at issue is clearly under the STB's jurisdiction, as the track is clearly under the control of a common carrier. As soon as the track was constructed, the Burlington Northern and Santa Fe Railway Company took over operation of and dispatching over the track pursuant to an "Industrial Track & Operating Agreement." BNSF is one of the largest common carrier railroads in the country.[1]

The track is used solely by BNSF for full, complete, unit trains traveling in a through journey in interstate commerce.[2] 49 U.S.C., § 10102, states in part (emphasis added):

---

[1] According to BNSF's website at www.bnsf.com it has approximately 33,000 route miles of track in 28 states and two Canadian Provinces and approximately 38,000 employees.

[2] Interestingly, BNSF's system map on its website, as of June 20, 2003, shows the track at issue as a "short line track" that is part of the BNSF system.

(6) "railroad" includes-...

(B) the road used by a rail carrier and owned by it **or operated under an agreement...**

(9) "transportation" includes-

(A)...property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, **regardless of ownership** or an agreement concerning use.

Respondents assert that the STB lacks jurisdiction over the track because the track is just used for the final leg of the interstate journey, from BNSF's main line common carrier track to the generating station, and BNSF does not provide common carrier service to any other shippers over the track. However, this Court long ago stated:

> The mere fact that a railroad lies wholly within one state, and is to be built by an independent corporation, does not of course, prevent the application of paragraphs 18 to 22. **If it undertakes to engage in interstate commerce**, its operation becomes immediately a matter of national concern and it comes within the purview of those paragraphs.
> *Texas & N.O.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 48 S. Ct. 361, 362 (1928). (Emphasis added.)

Thus, the critical issue is not whether there is common carriage over the track, but whether there is interstate commerce over the track, and in the case at bar, that critical fact is not in dispute.

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III.

THE DECISION UNDER APPEAL CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE STB.

On pages 4 and 6 of the Brief in Opposition filed by the Solicitor General is the following:

> That decision does not conflict with any decision of this Court or of another court of appeals...Petitioner contends (Pet. 24) that the Board has held in other cases that it has jurisdiction over private track that is not used for common carriage. In fact, however, all of the cases cited by petitioner address the preemptive effect of the Boards regulation of *common carrier* track.

These assertions are utterly false. This Court has long held that track used by a common carrier to invade the territory of another railroad required the approval of the federal regulatory authorities. As Willis pointed out in its Petition, spur and industrial tracks frequently are privately owned and serve only one shipper. In *Illinois Commerce Commission v. I.C.C.*, 879 F.2d 917 (D.C. Cir. 1989) at 919 N. 6, the Court noted:

> Comments in opposition to the petition were filed by C. Franke and Company, Inc., **the only shipper served by the spur**: (Emphasis added.)

In *New York Cent. Ry. Co. v. Southern Ry.*, 226 F.Supp. 463 (N.D. Ill. 1964), *aff'd* 338 F.2d 667 (7th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), *reh'g denied*, 381 U.S. 907 (1965) the Court noted the rail carrier:

> ...sends its cars for loading or unloading to the mine over track owned and maintained by the shipper. **Such service is frequently rendered over private track...**
> *New York Central*, 266 F. Supp. at 474 (Emphasis added.)

This Court long ago held that even such track was subject to the authorization requirements of what today is 49 U.S.C. § 10901 if using the track permitted a railroad to invade the service area of another carrier.

> If the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad within the meaning of paragraph 18, although the line be short and **although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks.** Being an extension, it cannot be built unless the federal Commission issues its certificate that public necessity and convenience require its construction.
> *Texas & P. Ry. v. Gulf, Colo. & S.F. Ry.* 270 U.S. 266, 278, 46 Sp. Ct. 263, 266, 70 L.Ed.578 (1926) (Emphasis added.)

> In the cases before us, for example, although the ICC may focus on the tenant railroad's use of the tracks solely for switching operations as the controlling factor in determining the tracks' character, if those switching operations have the effect of substantially extending the tenant

> railroads' lines into new territory, then the Commission may not decline jurisdiction. *Brotherhood of* Locomotive *Engineers v. U.S.*, 101 F.3d 718, 728 (D.C. Cir. 1996)

Moreover, this Court long ago recognized that when a common carrier such as BNSF uses track that it does not own, as is the case here, the federal regulatory authority would attach to the track.

> ...Congress did not intend its railroad regulatory provisions to depend on who had legal title to transportation instrumentalities...these definitions by their unambiguous language, make all trackage "in use by a common carrier" subject to the regulatory provisions of the Act, even though not owned by the carrier, but only used by it under a contract or agreement.
> *United States v. Baltimore & Ohio R. Co.*, 333 U.S. 169, 176, 68 S.Ct.494, 498 (1948).

The STB found that it had jurisdiction even over private track that only served the owning shipper and over which no common carrier operated in **STB Finance Docket No. 34020, *Fletcher Granite Company, LLC- Petition for Declaratory Order* (served June 29, 2001).** The STB noted, **"Fletcher laid the rail track on its property and provided its own rail service to the B&M interchange."** Respondents persist in falsely asserting that this case involved common carriage. In fact, the common carrier in this case, the Boston and Maine, did not operate over the private track. Rather, Fletcher Granite used a terminal railroad company, Springfield Terminal Railway Company, to move Fletcher Granite's shipments over Fletcher Granite's private track to the

B&M interchange where they were tendered to the common carrier.

Were there such a thing as a "private track exemption"[3] as claimed by Respondents, the STB would have advised Fletcher Granite the STB lacked any jurisdiction and that the private track was under the jurisdiction of state and local authorities. Instead, the STB advised the parties that the STB had exclusive jurisdiction over Fletcher Granite's private track, refuting any claim of a private line exemption.

Two other STB decisions Petitioner cited, STB Finance Docket No. 33971, *Borough of Riverdale-Petition for Declaratory Order-The New York Susquehanna and Western Railway Corporation*, (served February 27, 2001) and STB Finance Docket No. 33971, *Joint Petition for Declaratory Order-Boston and Maine Corporation and Town of Ayer, Ma.*, (served May 1, 2001) did, in fact, deal with common carrier track. However, the consistent holding in all of these decisions was that state and local officials could not have the authority to interfere with the construction and operation of ancillary tracks and facilities that were an integral part of a railroad's interstate operations.

BNSF has attested in a sworn affidavit to a U.S. District Court that without the track at issue, the interstate traffic involved, as well as millions of dollars of annual revenues would be diverted back to Union Pacific. However, Respondents now argue that this track, as well as numerous other tracks built by electric

---

[3] In a scathing opinion accompanying the majority opinion in *Hanson Natural Resources Company-Non-Common Carrier Status*-Petition for Declaratory Order, Finance Docket No. 32248 (ICC Served Dec. 5, 1994) then ICC Commissioner, later STB Chairman, Linda J. Morgan ridiculed the claim of a private line exemption as "gratuitous diversions into novel legal theory" and "some novel and untested legal theories-concerning for example, the classification of different kinds of railroad in general and, in particular the so-called "private line exemption.""

utilities throughout the country, is outside of STB jurisdiction and under the exclusive jurisdiction of state and local authorities.

PSO has never obtained an easement across Willis' property and the state condemnation action is pending the outcome of this case. If Respondents are correct, an elected state official, rather than the STB, will determine the public necessity for constructing the track and diverting millions of dollars of annual revenues between rival common carriers.

Such a result would be completely contrary to the law as it has existed since the Transportation Act of 1920 and would completely reverse the intent of the ICC Termination Act to completely preempt the field of railroad regulation.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed as it directly contradicts the plain wording of the applicable statutes and all relevant prior decisions of the United States Supreme Court, the D.C. Circuit, the ICC and the STB itself. The track at issue and BNSF's interstate operations over it are subject to the jurisdiction of the STB and the requirements of 49 U.S.C., §10901. As a result, the ongoing state condemnation action is a violation of that statute the STB is charged with enforcing.

Respectfully submitted,

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31730 SERVICE DATE - JUNE 29, 2001 DO

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34020

FLETCHER GRANITE COMPANY, LLC - PETITION FOR DECLARATORY ORDER

Decided: June 25, 2001

In a petition filed March 13, 2001, Fletcher Granite Company, LLC, successor in interest to H.E. Fletcher Company (Fletcher), seeks a declaratory order that the Board has exclusive jurisdiction over the resumption of rail service by Fletcher over certain sidetrack in Westford, MA. Fletcher owns and operates a granite quarry and stone fabrication mill in Westford and the sidetrack runs from its quarry and fabrication mill to the mainline connection of the Stoney Brook Branch of the Boston & Maine Corporation (B&M).[1] The Town of Westford filed a notice of appearance on March 26, 2001.

Fletcher indicates that rail operations connecting the granite quarry (located on the north side of Groton Road) and mill (on the south side of Groton Road) with the Stoney Brook Branch began in 1895. Fletcher laid

[1] Fletcher states that rail operations are conducted by the Springfield Terminal Railway Company, which, like B&M, is part of the Guilford Rail System.

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the rail track on its property and provided its own rail service to the B&M interchange. This service continued until about 1965, when Fletcher decided to ship granite by truck instead of rail. While Fletcher has discontinued rail service from the fabrication mill to the B&M, it has maintained rail service on the part of its track running from the quarry to the fabrication mill. With the exception of the switch to the B&M that was removed in 1965, the original track remains in place. Debris, however, has been dumped on the right-of-way by local land abutters, and residents have placed retaining walls and a landfill parallel to the track but within the right-of-way. Fletcher contends that neither it nor any other entity has attempted to abandon the track, and that it was not aware of the encroachments to its property until it began repair work in preparation for the reuse of the line.

Fletcher submits that it has had extensive discussions with B&M concerning reestablishing rail service and that the parties have agreed as to what would be needed to repair or upgrade the track. B&M has also agreed to replace the switch to the Stoney Brook line and to furnish rail service to and from the interchange.

Fletcher states that it has repaired the grade crossing at Groton Road and plans to improve another grade crossing at Brookside Road.[2] It has retained a

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[2] Fletcher states that the Federal Highway Administration (FHWA), pursuant to its Federal Railroad Grade Crossing Program, has funded 80% of the cost of the Groton Road grade crossing improvements. It has also approved funding for the Brookside Road grade crossing improvements, and funds will be released when work begins.

railroad design and construction consultant to determine what is needed to resume safe rail service. Fletcher asserts that the consultant believes "the required improvements are viable." Petition at 3 (citation omitted).

Fletcher is concerned that the resumption of rail service could be delayed or defeated if state and local officials try to regulate the matter. Fletcher claims that its concerns are not speculative, citing negative press coverage and alleged hostility by the local community to development in Westford. It also asserts that part of its right-of-way abuts a brook and wetlands, and that it has been told by local officials that resuming service would entail an environmental permitting process under state law and review by the local Conservation Commission. Fletcher states that it will submit its workplan to the Conservation Commission and will work consistently with applicable environmental standards by, for example, not storing materials in protected wetlands. Nevertheless, Fletcher asserts that, if its proposal comes under Conservation Commission review, it will likely "become involved in extensive, time-consuming hearings that will result in either denial of any permit application or the imposition of such expensive and unwieldy conditions that the project will be unfeasible to complete." Petition at 4 (citation omitted). In any event, Fletcher claims that the permitting process will substantially delay and add cost to the project.

Accordingly, Fletcher seeks a declaratory order that, under 49 U.S.C. 10501(b)(2), the Board has exclusive jurisdiction over the resumption of rail service and that local or state regulation is preempted. Fletcher argues that, while the Board does not have licensing and conditioning authority over ancillary facilities, citing 49 U.S.C. 10906, Congress gave the Board exclusive

jurisdiction over rail transportation under section 10501(b).

DISCUSSION AND CONCLUSIONS

Under the Administrative Procedure Act, "the agency, . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. 554(e). See also 49 U.S.C. 721. It would be premature for the Board to institute a declaratory order proceeding at this point, as there is not now, and may never be, a controversy that needs to be terminated. Westford, while filing a notice of appearance, has not submitted any substantive views on this matter. Nor does Westford appear to have taken any official action that would impede the resumption of rail service over Fletcher's track. Fletcher, moreover, has indicated that it will submit workplans and act consistently with applicable environmental standards. Thus, the Board will not attempt to intervene in this matter at this time.

Nevertheless, to provide guidance to the parties, this decision will summarize relevant court and agency case law addressing similar situations. Under 49 U.S.C. 10501(b)(2), as broadened by the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (ICCTA), the Board has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks or facilities, even if the tracks are located, or intended to be located entirely in one State." Section 10501(b)(2) further provides that both "the jurisdiction of the Board over transportation by rail carriers" and "the remedies provided under [49 U.S.C. 10101-11908] are exclusive and preempt the remedies provided under Federal or State law." See City of Auburn v. STB, 154

F.3d 1025, 1029-31 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (City of Auburn); Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Sept. 10, 1999) (Riverdale I) at 5. As several courts have held, this statutory preemption applies even in cases involving the construction of ancillary tracks and facilities under section 10906, even though the Board does not have licensing authority over such matters and therefore does not conduct its own environmental review.[3] See Flynn v. Burlington Northern Santa Fe Corp., 98 F. Supp.2d 1186 (E.D. Wash. 2000) (Flynn)[4] and cases cited in Joint Petition for Declaratory Order – Boston and Maine Corporation and Town of Ayer, MA, STB Finance Docket No. 33971 (STB served May 1, 2001) (Ayer) at 8, Riverdale I at 5-9, and Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna and Western Railway Corporation, STB Finance Docket No. 33466 (STB served Feb. 27, 2001) (Riverdale II) at 3.

In addressing the scope of 49 U.S.C. 10501(b), the courts have found that, under this broad preemption provision enacted in ICCTA, zoning ordinances and local land use permit requirements are preempted as to facilities that are an integral part of a railroad's

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[3] Under 49 U.S.C. 10906, "The Board does not have authority . . . over the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks."

[4] The Flynn court noted that while the Board does not have regulatory authority over section 10906 projects, it does have jurisdiction over these rail activities. Id. at 1189-90.

interstate operations. Norfolk Southern Ry. v. City of Austell, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236, at 17 n.6 (N.D. Ga. 1997); Village of Ridgefield Park v. New York, Susquehanna & Western Ry., 750 A.2d 57 (N.J. 2000) (Ridgefield Park). Moreover, state and local permitting or preclearance requirements (including environmental requirements) have been found to be preempted because, by their nature, they interfere with interstate commerce by giving the state or local body the ability to deny the carrier the right to construct facilities or conduct operations. Auburn and Kent, WA– Petition for Declaratory Order – Burlington N.R.R. – Stampede Pass Line, 2 S.T.B. 330 (1997) (Stampede Pass), aff'd, City of Auburn.[5]

The Board has regulatory authority over rail line constructions under 49 U.S.C. 10901, and it conducts an environmental review of such activities under the National Environmental Policy Act (NEPA), and can adopt appropriate environmental mitigation conditions in response to concerns of the parties, including local authorities. See Ayer at 4, n.14.[6] However, there is no

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[5] The argument that the statutory preemption in section 10501(b) is limited to state and local "economic" regulations was rejected by the court as contrary to the statutory text and unworkable in practice. City of Auburn, 154 F.3d at 1029-31.

[6] Under 49 U.S.C. 10901(a), a license from the Board (and an appropriate environmental review) is required for a railroad's construction of "an extension to any of its railroad lines . . . [or] . . . an additional railroad line . . . ." The terms "extension" and "additional railroad line" are not defined in the statute. These terms have been interpreted, however, in Texas & Pacific v. Gulf, Colorado & Santa Fe Ry., 270 U.S. 266 (1926) (Texas &

statutory requirement for a carrier to obtain Board approval to build or expand facilities that assist the railroad in providing its existing operations but that do not give the carrier the ability to penetrate new markets. See Nicholson v. ICC, 711 F.2d 364, 368-70 (1983), cert. denied, 464 U.S. 1056 (1984); Riverdale I. Railroads also do not require Board authority to upgrade an existing line, and, as noted, the law explicitly provides that a license is not required to construct "spur," "industrial," or "switching" tracks, see 49 U.S.C. 10906. Where no license is required, there is no environmental review conducted by the Board. Regardless of whether a project falls under section 10901 or 10906, however, the preemption provisions of section 10501(b) apply.

It should be noted, moreover, that in Stampede Pass, Riverdale I, and Ayer, the Board expressed its view that not all state and local regulations that affect railroads are preempted.[7] The Board has stated that

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Pacific), as those tracks that enable a railroad to penetrate or invade a new market. See Union Pacific Railroad Company – Petition for Declaratory Order – Rehabilitation of Missouri-Kansas-Texas Railroad Between Jude and Ogden Junction, TX, STB Finance Docket No. 33611 (STB served Aug. 21, 1998).

[7] In Stampede Pass, 2 S.T.B. at 339, the Board offered the following examples of state and local regulation that would not be preempted:

> a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly, . . . a state or local government could issue citations or seek damages if

state and local regulation is appropriate where it does not interfere with interstate rail operations, and localities retain certain police powers to protect the public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted. Riverdale I at 8-9; Flynn. While a locality cannot require permits prior to construction, the courts have found that a railroad can be required to notify the local government "when it is undertaking an activity for which another entity would require a permit" and to furnish its site plan to the local government. Ridgefield Park. Local authorities can take actions that are necessary and appropriate to address a genuine emergency on railroad property.

Finally, the Board has concluded that "nothing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the [Clean Water Act], and the [Safe Drinking Water Act]." Ayer at 9.[8] Thus, the lack of a specific environmental

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> harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

[8] Section 10501(b) also does not preempt valid safety regulation under the Federal Rail Safety Act, 49 U.S.C.

remedy at the Board or at the local level as to construction projects over which the Board lacks licensing power does not mean that there are no environmental remedies under other Federal laws. Whether a particular Federal environmental statute, local land use restriction, or other local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Id.[9]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Petitioner's request for a declaratory order proceeding is denied.

20101 et seq. See Tyrrell v. Norfolk Southern Railway Company, No. 99-4505 (6th Cir. Apr. 25, 2001); Riverdale II at 2 n.4.

[9] The Board indicated, Ayer at 10, that

> individual situations need to reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted.

2. This decision is effective on July 29, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams
Secretary